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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 21

HERMAN C. GROMAN, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 5, 1937.

CERTIORARI GRANTED MAY 24, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX.

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	2
Deficiency letter of January 19, 1932	5
Statement	6
Answer	9
Memorandum opinion, Black, M.	10
Decision	19
Petition for review	19
Assignments of error	23
Notices of filing petition for review	26
Orders enlarging time for delivery of record to United States Circuit Court of Appeals	27
Præcipe for record	28
Certificates of clerks	29
Proceedings in U. S. C. C. A., Seventh Circuit	33
Placita	33
Motion of petitioner as to printing record	33
Order that record in No. 5779 only be printed, etc.	36
Appearance for respondent	38
Appearance for petitioner	39
Appearance for petitioner	39
Appearance for petitioner	40
Hearing	41
Motion of respondent for leave to cite additional authority	42
Opinion by Evans, J.	43
Judgment	47
Reference to filing of petition for a rehearing	48
Order denying petition for rehearing	48
Reference to issuance of mandate	48
Certificate of clerk	49
Order allowing certiorari	49

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—9151-C

1 Herman C. Groman,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 62930

Appearances:

For Taxpayer: David L. Krebs, Jr. Esq.

For Comr.: Elden McFarland, Esq., Walter W. Kerr, Esq.

DOCKET ENTRIES.

Transferred to Mr. Black 6/14/35.

1932.

Mar. 17—Petition received and filed. Taxpayer notified. (Fee paid)
Mar. 17—Copy of petition served on General Counsel.
Apr. 26—Answer filed by General Counsel.
May 3—Copy of answer served on taxpayer. General Calendar.

1933.

Apr. 3—Hearing set May 3, 1933.
Apr. 13—Motion for circuit hearing at Chicago filed by taxpayer. 4/15/33 granted.

1934.

Jan. 18—Hearing set for week of 3/5/34 at Chicago Ill.
Mar. 6—Hearing had before Mr. Goodrich, Div. 11 on merits. Motion to consolidate Dockets 62930 to 37 inc. granted. Commissioner's brief and petitioner's brief filed at hearing.
Mar. 26—Transcript of hearing of 3/6/34 filed.

1935.

Jun. 17—Memorandum opinion rendered, Mr. Black, Decision will be entered under Rule 50.
Jul. 18—Notice of settlement filed by General Counsel.
July. 20—Hearing set August 7, 1935 on settlement.
Aug. 7—Hearing had before Mr. Black on settlement under

Rule 50. Not contested—referred to Mr. Black for decision.
Aug. 7—Consent to settlement filed by taxpayer.
Aug. 8—Decision entered, Div. 15, Eugene Black.
Oct. 30—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.
Nov. 5—Proof of service filed by General Counsel.
Nov. 8—Proof of service of petition for review filed.
Dec. 10—Motion for extension to Jan. 29, 1936 to settle evidence and transmit record filed by General Counsel.
Dec. 10—Order enlarging time to Jan. 26, 1936 for preparation and delivery of record entered.

1936.

Jan. 21—Praecipe with proof of service thereon filed by General Counsel.
Jan. 29—Order enlarging time to March 2, 1936 for transmission and delivery of record entered.

Mar. 17, 2 BEFORE THE UNITED STATES BOARD OF TAX APPEALS.

Herman C. Groman,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 62930

PETITION.

Filed March 17, 1932.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:D-1:-SAW-60 D. dated January 19th, 1932, and as the basis of his proceeding alleges as follows:

1. The petitioner is an individual with his residence at 7 Wildwood Road, Hammond, Indiana.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on January 19th, 1932.

3. The taxes in controversy are income taxes for the calendar year 1929 and for seven thousand four hundred twenty and five one-hundredths dollars ($7,420.05).

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

In treating as taxable income the value of certain shares of stock of a corporation a party to a reorganization,
3 received in exchange for shares of another corporation previously owned by petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Metals Refining Company was an Indiana corporation having an authorized capital stock of five hundred thousand dollars ($500,000) consisting of five thousand (5000) shares of a par value of One Hundred Dollars ($100) each, of which four thousand four hundred twenty one (4421) were issued and outstanding at January 29, 1929.

(b) Petitioner was on January 29, 1929 and for more than two years prior thereto the owner of five hundred (500) shares of the capital stock of said Metals Refining Company, the cost of which shares to petitioner was Forty-thousand three hundred fifty dollars ($40,350).

(c) The Glidden Company is, and was on January 29, 1929, a corporation organized and existing under the laws of the State of Ohio.

(d) Metals Refining Company was engaged in the business of refining lead and in the production of various alloys. The Glidden Company is and was engaged principally in the manufacture of paint and varnish.

(e) On January 29, 1929, the petitioner and all the other stockholders of Metals Refining Company entered into an agreement with The Glidden Company for the acquisition by a corporation to be organized by it of all of the capital
4 stock of said Metals Refining Company through the exchange of the entire capital stock of Metals Refining Company for cash, preferred stock of The Glidden Company and non-voting preferred stock of the corporation to be formed by it, which last mentioned preferred stock was to be guaranteed by The Glidden Company, both as to cumulative dividends payable quarterly at the rate of 6% per annum and as to redemption at par value on or before four (4) years from the date of issuance, all of the common and voting stock of the company so to be formed to be purchased for cash and to be owned by The Glidden Company.

(f) Pursuant to said agreement, The Glidden Company caused the formation under the laws of the State of Oho, of a corporation by the name of Metals Refining Company of Ohio, having both preferred and common stock, all of which preferred stock consisting of five thousand (5000) shares was

guaranteed by The Glidden Company, both as to dividends and principal, by an agreement dated March 22nd, 1929, with First Trust & Savings Bank of Hammond, Indiana, as Trustee for the shareholders of Metals Refining Company, an Indiana corporation, and all of which common and voting stock was acquired by The Glidden Company.

(g) Thereafter, in compliance with said agreement of January 29, 1929, The Glidden Company, in exchange for five hundred (500) shares of the capital stock of Metals Refining Company, an Indiana corporation, owned by petitioner, transferred to Metals Refining Company of Ohio, caused the transfer to petitioner of five hundred ninety-six (596) shares of its own preferred stock and caused to be paid to petitioner the sum of seventeen thousand two hundred ninety-three and fourteen one-hundredths dollars ($17,293.14) in cash and to be issued to petitioner five hundred sixty-five (565) shares of the 6% Guaranteed Preferred Stock of Metals Refining Company of Ohio.

(h) In determining the basis for exchange of Metals Refining Company stock for cash and securities, the goodwill of Metals Refining Company was fixed by the agreement of January 29, 1929, at a value of five hundred thousand dollars ($500,000) and in the consummation of said agreement was in fact so treated.

(i) Petitioner filed his income tax return for the year 1929 with the Collector of Internal Revenue at Indianapolis, Indiana, including therein as income the amount of cash received in the consummation of the exchange hereinbefore described.

(j) Regular quarterly dividends upon the preferred stock of Metals Refining Company of Ohio, payable at the rate of 6% per annum have been paid by The Glidden Company.

Wherefore, The petitioner prays that this Board may hear the proceeding and redetermine the tax liability of petitioner, after holding that the exchange herein mentioned was pursuant to a plan of organization and that the profit derived therefrom by petitioner was not in excess of the amount of cash received by petitioner.

Respectfully submitted,

DAVID L. KEEBS, JR.,
Counsel for Petitioner,
Address: Armour and Company,
Union Stock Yards,
Chicago, Illinois.

State of Indiana, } ss.
County of Lake. }

HERMAN C. GROMAN, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein; and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

HERMAN C. GROMAN.

Subscribed and sworn to before me this 11th day of March, 1932.

FLORENCE L. CHAPMAN,
(Seal) *Notary Public.*

My commission expires 5/24/35.

NP-2-28

7 TREASURY DEPARTMENT

Washington

Office of
Commissioner of Internal Revenue

Jan. 19, 1932.

Address reply to
Commission of Internal Revenue
and refer to
Dr. Herman C. Groman,
7 Wildwood Road,
Hammond, Indiana.

Sir:

You are advised that the determination of your tax liability for the year (s) 1929 disclose a deficiency of $7,420.05, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire to Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington,

D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return (s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner,
By J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870

8 Statement.

IT:AR:D-1
SAW-60D

In re: Dr. Herman C. Groman,
7 Wildwood Road,
Hammond, Indiana.

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$7,427.15	$7.10	$7,420.05

The report of the internal revenue agent in charge at Indianapolis, Indiana, covering an investigation of your books and records for the year 1929, has been reviewed and approved.

The information submitted at the conference held in the agent's office July 24, 1931, has been given careful consideration. From the evidence at hand and upon a literal construction of the reorganization features of the Revenue Act of 1928, it is held that a Glidden Company does not meet the statutory test as to "a party to a reorganization" as defined in section 112 (i)(1)(A) of the Revenue Act of 1928.

At the conference held in this office December 3, 1931, with your representative no new evidence was presented. Therefore, this letter of final determination is issued.

A synopsis of the adjustments follows:

Net income reported on return		$10,710.25
Add:		
1. Error corrected	$ 0.48	
2. Increased profits	79,873.14	79,873.62
Total		$90,583.87
Deduct:		
3. Loss allowed	$ 7,354.00	
4. Dividends	17,300.00	24,654.00
Net income adjusted		$65,929.87

Computation of Tax

Total net income adjusted		$65,929.87
9 Less:		
Dividends	$ 4,130.00	
Personal exemption and credit for defendants	4,700.00	8,830.00
Net income subject to normal tax		$57,099.87
Normal tax at ½% on $4,000.00		20.00
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $49,099.87		1,963.99
Surtax on $65,929.87		5,368.08
Total		$ 7,432.07
Less:		
Earned income credit		4.92
Tax liability		$ 7,427.15
Tax previously assessed		7.10
Deficiency		$ 7,420.05

Explanation of Changes.

1. To correct an error in computing income from business.
2. During 1929 you exchanged your common stock of the Metals Refining Company of Hammond, Indiana, for cash of $17,293.14; 596 shares of preferred stock of Glidden Company

of Cleveland, Ohio, and 565 shares of preferred stock of Metals Refining Company of Ohio. The transaction has been held taxable under section 112 (c)(1) of the Revenue Act of 1928.

The profit has been recomputed as follows:

Cash received	$ 17,293.14
596 shares Glidden Company preferred at $105.00	62,580.00
565 shares Metals Refining Company at $100.00	56,500.00
Total consideration	$136,373.14
10 Cost 500 shares Metals Refining Company of Indiana	40,350.00
Profit on exchange	$ 96,023.14

Profit taxable, not in excess of cash and fair market value of other property:

Cash	$17,293.14
Market value, Glidden Company stock	62.580.00
Profit taxable	$79,873.14

3. Inasmuch as the total value of Glidden stock was treated as equivalents to cash at $105.00 a share, the profit reported from the sale of 117 shares has been eliminated and the loss sustained on same together with the selling expense has been allowed in addition.

Amount of profit reported on sale of 117 shares eliminated	$7,020.00
Allowed: Loss on sale of 117 shares	234.00
Selling expense	100.00
Total	$7,354.00

4. The cash received $17,293.14 has been erroneously reported (in round figures) as dividends of $17,300.00 on your return. This amount has been eliminated and corrected as shown in #2 above.

A copy of this communication is being forwarded to your representative, Mr. Nelson T. Hartson, 810 Colorado Building, Washington, D. C., in accordance with authority conferred by the power of attorney on file in this office.

11 UNITED STATES BOARD OF TAX APPEALS. Filed Apr. 1932.

* * (Caption—62930) * *

ANSWER.

Filed Apr. 26 1932.

The Commissioner of Internal Revenue by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed by the above named petitioner, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1 of the petition.

2. Admits the allegations contained in Paragraph 2 of the petition.

3. Admits the allegations contained in Paragraph 3 of the petition.

4. Denies error in the action recited in Paragraph 4 of the petition.

5 (A) to (J), inclusive. Denies each and every allegation of fact contained in Paragraph 5(A) to (J), inclusive, of the petition, which is inconsistent with and contrary to the determination of the Commissioner as stated in the notice of final determination of deficiency dated January 19, 1932.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

12 Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
MAXWELL M. MAHANY,
Special Attorney, Bureau of Internal Revenue.

June 17, 13 UNITED STATES BOARD OF TAX APPEALS.

Herman C. Groman,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Frank S. Betz,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Charles W. Wilson,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Mary Wilke, Executrix, Estate of William Wilke,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Erwin L. Wilke,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Martha Wilke,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

William Wilke, Jr.,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

C. H. Denning,
vs. *Petitioner,*
Commissioner of Internal Revenue,
Respondent.

Docket Nos. 62930-62937.

David L. Krebs, Jr., Esq., for the petitioners.
Elden McFarland, Esq., for the respondent.

14 MEMORANDUM OPINION.

BLACK: These proceedings have been consolidated. Re-

spondent has determined deficiencies for the year 1929 as follows:

Herman C. Groman	$ 7,420.05
Frank S. Betz	7,042.65
Charles W. Wilson	349.49
Mary Wilke, Executrix, Estate of William Wilke	4,157.40
Erwin L. Wilke	11,255.08
Martha Wilke	585.47
William Wilke, Jr.	20,370.68
C. N. Dehning	897.86

One error common to all the proceedings has been assigned. It is stated in the petitions as follows:

> "The determination of tax set forth in the said notice of deficiency is based upon the following error:
>
> In treating as taxable income the value of certain shares of stock of a corporation, a party to a reorganization, received in exchange for shares of another corporation previously owned by petitioner."

The facts have been stipulated as follows:

Prior to January 29, 1929, all of the above-named petitioners were shareholders in the Metals Refining Company located at Hammond, Indiana. Metals Refining Company was an Indiana corporation having an authorized capital stock of $500,000.00 consisting of 5,000 shares of a par value of $100 each, of which 4,421 shares were issued and outstanding at January 29, 1929.

The Glidden Company is and was on January 29, 1929, a corporation organized and existing under the laws of the State of Ohio. Metals Refining Company was engaged in the business of refining lead and in the production of various alloys. The Glidden Company is and was engaged principally in the manufacture of paints and varnishes.

15 Under date of January 29, 1929, an agreement was executed by and between the Glidden Company of Cleveland, Ohio, and the holders of all of the outstanding stock of the Metals Refining Company (Indiana). The pertinent provisions in this agreement to the issue in these appeals are as follows:

> "That whereas, the shareholders ar desirous of merging and consolidating the properties of their company with the Glidden Company and with a corporation to be incorporated and organized under the laws of Ohio, such merger or consolidation to be effected in the manner hereinafter set forth."

The agreement then stipulates that the shareholders of Metals Refining Company represent that they are the owners of record of stock, that the Metals Refining Company is the owner of all property set forth in its financial statement as of December 31, 1928, and that such statement truly reflects the assets and liabilities as of that date free from all liens and incumbrances, that they will permit an audit and an appraisal to be made by Glidden Company to establish the value of the stock of Metals Refining Company.

The agreement further provides:

"The shareholders agree that they will severally assign, transfer and set over the shares of the Indiana corporation owned by them for the consideration hereinafter set forth, unto a corporation to be organized by the Glidden Company under the laws of the State of Ohio, having the following capitalization:

"Five Thousand (5,000) preferred shares,—par value One Hundred Dollars (100.00) each. Such preferred shares shall entitle the holder thereof to cumulative dividends at the rate of six per centum (6%) per annum, payable quarterly, shall be non-voting, except as otherwise provided by law, to be subject to redemption at any time at the election of the company at par value plus accrued dividends, * * *. The payment of such dividends and the redemption of such stock on or before four (4) years from the date of incorporation shall be guaranteed by the Glidden Company. The company shall have such number of common shares, par or non-par, as the Glidden Company may determine, all of which shall be acquired by Glidden Company for a cash consideration sufficient to meet the requirements of Section 7.

16 "Section 7—The Glidden Company agrees that it will cause to be incorporated and organized under the laws of the State of Ohio a corporation having suitable charter powers and authority to conduct the business of the Indiana company, having a similar name, if it be available, and capitalized as hereinbefore set forth, and upon the transfer of the stock of the shareholders will cause its properties and assets to be conveyed and transferred to the new Ohio company.

"The Glidden Company further agrees that as a consideration for such consolidation, and subject to the approval of the Division of Securities of the Department of Commerce of the State of Ohio, it will issue and deliver or cause to be delivered shares of its own stock and of

the new Ohio company to the shareholders of the Indiana company, and will cause cash payment to be made to them as follows:

"The sound value of fixed assets of the Indiana Company is to be determined by the American Appraisal Company of Milwaukee, Wisconsin. The good will of the Indiana company for the purpose of this agreement shall be valued at Five Hundred Thousand Dollars ($500,000.00). The book value of all other assets as of March 1, 1929, including inventories at the lower of cost or market, less liabilities (including in such liabilities reasonable reserves for discounts, freights and unadjusted claims) as approved by auditors selected by the Glidden Company shall be used.

"Against the total value of the assets so determined there shall be issued—

(a) Up to 5,275 shares of 7% prior preference stock of the Glidden Company on the basis of One Hundred Five Dollars ($105.00) per share.

(b) Up to 5,000 shares of the 6% cumulative preferred stock of the new Ohio Company, hereinbefore referred to, on the basis of One Hundred Dollars ($100.00) per share.

(c) After deducting from the total value of such assets the amount of prior preference stock and preferred stock issued on the basis above set forth, the remaining value of such assets shall represent the amount of cash payable to the shareholders of the Indiana Company on the consummation of such consolidation.

17 Pursuant to the above-quoted agreement the Glidden Company caused to be organized under the laws of the State of Ohio a corporation by the name of Metals Refining Company of Ohio having both preferred and common stock. Soon after the transfer by petitioners of their stock in the Metals Refining Company of Indiana to the new Ohio company of the same name, Glidden and Company which was the owner of all of the voting stock of the new company (100 shares), caused the properties and assets of the Indiana company to be conveyed and transferred to the new Ohio company. The Glidden Company did not receive any shares of preferred stock of the new Ohio company. The Indiana Company was thereafter dissolved.

Pursuant to the agreement of January 29, 1929, the sound value of the assets of the Indiana company including good will was fixed at $1,207,046.66. This sound value represented

the sale price at which the stock was sold and the consideration received by the stockholders consisted of the following:

5,276 shares 7% prior preference stock of Glidden Company at $105.00	$553,950.00
5,000 shares of 6% preferred stock of Metals Refining Company of Ohio at $100.00	500,000.00
Cash	153,036.66
	$1,207,016.66

The petitioners were not consistent in reporting the profit from the foregoing transaction. Most of them, however, reported profit to the extent of the cash received while others reported profit in excess of that sum and in one instance the cash in round figures was reported as a dividend.

18 The Commissioner determined that the Glidden Company was not a party to a reorganization and accordingly treated as taxable income the cash received plus the fair market value of the prior preference stock of the Glidden Company.

The number of shares of stock exchanged and received and the sum of the cash received by the respective petitioners, are as follows:

	Exchanged Shares of Stock	Rec'd Shares of Preferred Stock		
Petitioner	Metals Refining Co. (Ind.)	Metals Refining Co. (Ohio)	Glidden Co.	Cash
Herman C. Groman	500	545	696	$17,293.14
Frank E. Betz	470	530	589	16,231.89
Charles W. Wilson	115	130	137	3,973.95
Mary Wilke, Exec., Est. William Wilke, Dec'd	236	265	279	8,110.94
Erwin L. Wilke	608	695	735	31,272.10
Martha Wilke	104	120	127	3,672.88
William Wilke, Jr.	1,135	1,290	1,362	39,463.46
C. W. Dehning	67	75	79	2,295.56

The applicable provisions of the Revenue Act of 1928 to this proceeding are stated in the margin.[1]

[1] Sec. 112 (b) (3). Stock for Stock of Reorganization.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization. * * *

Sec. 112 (c) (1). If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

19 It is the contention of the Commissioner that the Glidden Company was not a party to the reorganization. The Commissioner's contention is stated in the deficiency notices, as follows: "It is held that the Glidden Company does not meet the statutory test as to 'a party to the reorganization' as defined in Section 112 (i) (1) (4) of the Revenue Act of 1928. The provision of the 1928 Act to which the Commissioner refers relating to the definition of what constitutes a reorganization, is stated in the margin.[2]

The same contention which the Commissioner makes in these proceedings was made by him in *The Fifth Avenue Bank of New York, Executor of the Estate of Frederick D. Bell, Deceased*, 31 B. T. A., 945, and was decided against him. In that case the taxpayer, Frederick D. Bell was the owner of certain shares of the Lederle Antitoxin Laboratories (hereinafter called Lederle).

20 On February 13, 1930, Lederle entered into an agreement with the American Cyanamid Co., a Maine corporation (hereinafter called Cyanamid), which provided in part as follows:

> 1. Lederle and Cyanamid shall as soon as reasonably may be reorganize by Lederle transferring or causing to be transferred to Cyanamid or to a new corporation to be formed and nominated by Cyanamid, * * * all the properties of Lederle as an entirety * * * but subject to all liabilities of Lederle * * * the said properties embracing, among other things, all the assets, business and good will of Lederle as a going concern * * * the right to use the name "Lederle" and/or "Lederle Antitoxin Laboratories" and/or "Lederle Antitoxin Laboratories, Incorporated" * * *.
>
> 2. In consideration of said transfer and as a part of

---

[2] (i) Definition of Reorganization.—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation, or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however affected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

said reorganization (a) Cyanamid will caused to be delivered to Lederle in such name or names as Lederle may direct sixty-four thousand five hundred (64,500) shares of the duly and legally issued full paid and non-assessable Class "B" Common stock without par value and without any voting rights of Cyanamid, and (b) Cyanamid will cause to be delivered to Lederle in such name or names as Lederle may direct all of the authorized seventy-five thousand (75,000) shares of the no par preferred stock of the new corporation, said preferred stock to be callable at any dividend day at Nineteen and two-thirds Dollars ($19⅔) per share, plus accrued and unpaid dividends thereon * * *; said preferred stock shall be entitled to cumulative dividends at the rate of but not exceeding one and twelve-one-hundredths Dollars ($1.12) per share per annum * * * (c) Cyanamid will cause the transferee of the aforesaid assets to assume the payment of all obligations and indebtedness of Lederle * * *.

It was further agreed that Lederle "as soon as reasonably may be" would change its name, dissolve and liquidate, and distribute to its shareholders the Cyanamid B Stock and the stock of the new corporation.

The new corporation above referred to was organized under the Laws of Delaware as "Lederle Laboratories, Inc." (hereinafter called Laboratories, Inc.), with an authorized capital stock of 1,000 shares common and 75,000 shares preferred stock.

21 Upon organization of Laboratories, Inc., Cyanamid made formal offer to convey or cause to be conveyed all the assets of Lederle which were the subject of the agreement of February 13, 1930, and also all the outstanding stock of Davis & Geck, Inc., which was then owned by Cyanamid. The offer was made in consideration of Laboratories, Inc. issuing all of its 75,000 shares of preferred stock to Lederle or its nominees, and all of its 1,000 shares of common stock to Cyanamid.

The offers and agreements above mentioned were duly submitted to and approved by the directors and stockholders of the several corporations.

The several agreements were consummated, and on February 13, 1930, Laboratories, Inc., issued 1,000 shares of its common stock to Cyanamid and 75,000 shares of its preferred stock to the stockholders of Lederle. At the same time Cyanamid issued 64,300 shares of its B common stock to the stock-

holders of Lederle. At the same time Lederle formally changed its name to Lynbell Corporation and on June 5, 1930, was dissolved.

On these facts which we have stated above, the Commissioner contended Cyanamid was not a party to the reorganization and that the 64,500 shares of its B common stock which it issued to the stockholders of Lederle was a part of the gain which was to be recognized, and was not freed from tax recognition by the provisions of Section 112 (b) (3), Revenue Act of 1928.

As has already been stated, we held against the contention of the Commissioner and held that Cyanamid was a party to the reorganization. On that point we said:

> Examining some of the steps taken in connection with the transfer of property and exchange of securities, it is to be noted that the principal underlying agreement is
> 22 that of February 13, 1930, between Lederle and Cyanamid. Therein Lederle agreed to transfer its properties "to Cyanamid or to a new corporation to be formed and nominated by Cyanamid." As part of the consideration under this agreement Cyanamid agreed to issue 64,500 shares of Class B common stock to Lederle or its nominees. The directors of Cyanamid formally approved the agreement, approved the organization of Laboratories, Inc. and authorized the transfer to it of all the stock of Davis & Geck, Inc., then owned by Cyanamid. The transfer of Lederle properties to Laboratories, Inc., was accomplished, not as a consequence of direct negotiations between those two, but as the result of an offer by Cyanamid to "convey or cause to be conveyed" to Laboratories, Inc., all of the properties of Lederle. Cyanamid obtained actual control of the new corporation by the acquisition of all of its common stock. This outline of Cyanamid's participation in the reorganization indicates that it was in a very substantial way "a party to the reorganization." It was so intimately connected with the several transactions which resulted in the statutory reorganization that in our opinion it must be held to be a party to the reorganization within the statutory sense of the term. The situation here is very similar to that of *Tulsa Oxygen Co.*, 18 B. T. A. 1283. In that case the Tulsa Oxygen Co. agreed to sell its properties to the Union Carbide & Carbon Corporation for stock of the latter. A contract was subsequently drawn designating a subsidiary of Union

Carbide & Carbon as the transferee, but upon the actual transfer the Tulsa Oxygen Co. parceled out its assets to several of Union Carbide & Carbon's subsidiaries by direct assignments without regard to the contract. We held that the transaction was a statutory reorganization and that gain was not to be recognized upon the Tulsa Oxygen Co.'s receipt of the stock for its assets. We said in part:

> It is apparent that the transaction here involved almost literally satisfies the statutory definition of a non-taxable corporate reorganization. It is clear that the transaction was between the petition and the Union Carbide & Carbon Corporation. All details of the sale were worked out in advance between them and payment made, in accordance with such agreement, out of the stock of this holding corporation. The substitution, therefore, of the name of a subsidiary corporation, in the contract at the suggestion of the attorney was a mere expediency that in no practical way changed the status of the parties responsible for the deal. * * *

While in the *Tulsa Oxygen Co.* case we did not directly discuss the matter of whether Union Carbide & Carbon was "a party to the reorganization," it must necessarily have been; otherwise, the receipt of its stock would have been subject to the gain or loss provisions. We are of the opinion that in this case Cyanamid was a party to the reorganization, and accordingly its stock was received by Bell without recognition of gain.

Summarizing what we have said thus far, we hold that both Laboratories, Inc. and Cyanamid stock were received by Bell without recognition of gain. Consequently respondent's motion for an increased deficiency, on the ground of the exchange of stock for stock being a taxable transaction, is denied.

23 *The Fifth Avenue Bank of New York, Executor, supra,* was a well considered case and for the reasons which we have stated, is controlling here. Consequently we hold that both the shares of 7% prior preference stock of Glidden Company and the shares of 6% preferred stock of Metals Refining Company of Ohio were received by petitioners without recognition of gain. The cash received must of course be recognized for taxation in accordance with the provisions of Section 112 (c) (1) which we have quoted in the margin.

Decision will be entered under Rule 50.

Entered: Jun 17, 1935.

24 UNITED STATES BOARD OF TAX APPEALS. Entered Aug 1935.

* * (Caption—62930) * *

DECISION.

This proceeding having been called on the Day Calendar for hearing under Rule 50 of the Board's Rules of Practice and the respondent having filed his notice of settlement with statement of recomputation attached, which statement was not contested by the petitioner and which was in accordance with the Board's memorandum opinion in this proceeding entered June 17, 1935, it is:

Ordered and Decided that there is a deficiency in income tax of the above-named petition for the year 1929 in the amount of $17.53.

(Seal) *Member.*
Entered Aug 8 1935

25 IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Filed Oct. 1935.

For the Seventh Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner*, *vs.* Herman C. Groman, *Respondent.* } Docket No. 62930.

PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS AND ASSIGNMENTS OF ERROR.

Filed Oct 30 1935.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and Claude R. Mar-

shall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Jurisdiction.

That the petitioner on review (hereinafter referred to as the Commissioner), is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

26 The respondent on review, Herman C. Groman, (hereinafter referred to as the taxpayer) is an individual residing at 7 Wildwood Road, Hammond, Indiana, and was residing at the same address and place at the time of his Federal individual income tax return for the calendar year 1929 was filed, and is an inhabitant of the judicial circuit of the United States Circuit Court of Appeals for the Seventh Circuit. Said Herman C. Groman filed his Federal income tax return for the calendar year 1929 with the Collector of Internal Revenue for the District of Indiana, located at Indianapolis, Indiana, within the judicial circuit of the United States Circuit Court of Appeals for the Seventh Circuit.

II.

On January 19, 1932, the Commissioner of Internal Revenue determined a deficiency in income tax against the respondent on review, the taxpayer, for the calendar year 1929, in the amount of $7,420.05, and sent the taxpayer, by registered mail, a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928. Thereafter, on March 17, 1932, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals contesting the total deficiency determined. The Commissioner filed his answer to the petition on April 26, 1932.

The case came on for hearing before the said Board of

27 Tax Appeals on March 6, 1934, having been consolidated for hearing and decision on the same day with the associated appeals of Frank S. Betz, Docket No. 62931; Charles W. Wilson, Docket No. 62932; Mary Wilke, Executrix, Estate of William Wilke, Docket No. 62933; Erwin L. Wilke, Docket No. 62934; Martha Wilke, Docket No. 62935; William Wilke, Jr., Docket No. 62936, and C. H. Dehning, Docket No. 62937.

On June 17, 1935, the Board of Tax Appeals promulgated and entered its consolidated memorandum opinion and on August 8, 1935, said Board of Tax Appeals entered its final decision and order of redetermination wherein and whereby it ordered and decided that there is a deficiency in tax for the year 1929 in the amount of $17.53.

Petitioner on review seeks a review of the Board's decision by virtue of the provisions of the Revenue Act of 1926, Sections 1001-1003, c. 27, 44 Stat. 9, as amended by the Revenue Act of 1932, Section 1101 c. 209, 47 Stat. 169.

III.

Nature of the Controversy.

Prior to January 29, 1929, the respondent herein owned 500 shares of common capital stock of the Metals Refining Company of Indiana (hereinafter sometimes referred to as the "Indiana Company" and the "old corporation"), which had an authorized capital stock of $500,000.00, consisting of 5,000 shares of a par value of $100 each of which 4,421 were issued and outstanding on January 29, 1929. The Glidden Company (hereinafter sometimes referred to as the "new corpo-
28 ration") was an Ohio corporation. On January 29, 1929, an agreement was executed by and between the Glidden Company and the stockholders of the Indiana Company to the effect that the latter were desirous of merging and consolidating the properties of their company and that of the Glidden and that the same would be effected substantially as follows:

(1) A new corporation was to be organized under the laws of Ohio by the Glidden Company with 5,000 shares of preferred stock—no par value of $100 each with cumulative dividends—non-voting redemption on or before four years to be guaranteed by the Glidden Company, and such number of common voting shares, par or non-par value as may be determined by the Glidden Company, all of which common was to be acquired by the Glidden Company for cash. (One hundred shares were acquired. The new corporation was to carry on the business of the Indiana Company under a similar name;

(2) The sound value of the assets of the Indiana Company was to be fixed at $1,207,046.66, including good will of $500,000, which was to represent the sales price. Against the total sound value of the said assets there were to be issued;

(a) up to 5275 shares of 7% prior preference stock of the Glidden Company on basis of $105 per share; (b) up to 5000 shares of the 6% cumulative preferred stock of the new Ohio Company on the basis of $100.00 per share; and (c) after deducting from the total value of such assets the amount of stock set forth in (a) and (b), the remaining value of
29 such assets shall represent the amount of cash payable to the shareholders of the Indiana Company on the consummation of such consolidation.

(3) The respondent herein and the other shareholders agreed to assign and transfer their shares in the Indiana Company to the new corporation for the following consideration, if Glidden Company would cause the assets of the Indiana Company to be transferred to the new corporation:

(a) 5,276 shares of 7% prior preference stock of Glidden Co. at $105	$553,980.00
(b) 5,000 shares of 6% preferred stock of Indiana Co. of Ohio (new corporation) at $100	500,000.00
(c) Cash (remanding value of assets)	153,036.66
Total sound value of assets	$1,207,016.66

The above agreement was carried out and the Indiana Company was thereafter dissolved.

As a result of the above transaction the taxpayer received in 1929 for his 500 shares of common stock of the Metals Refining Company, cash of $17,293.14; 596 shares of preferred stock of Glidden Company, and 565 shares of preferred stock of Metals Refining Company of Ohio.

The taxpayer reported on his income tax return for the year 1929 as dividends the cash received in the round figures of $17,300.00.

In the audit of the return the Commissioner determined that the Glidden Company was not a party to a reorganization within the meaning of Section 112 (i)(2) and 112 (b)(3) of the Revenue Act of 1928 and accordingly considered the transaction a taxable exchange and computed as taxable
30 income the cash received, $17,293.14, plus the fair market value of the 596 shares of prior preference stock of the Glidden Company ($105.00 per share) $62,580.00 or a

total of $79,873.14 as provided by Section 112 (c)(1) of the Revenue Act of 1928, as follows:

Cash received—	$17,293.14
596 shares Glidden Co. pfd. @ $105.00	62,580.00
565 shares Metal Refining Co. @ $100.00	56,500.00
Total consideration	$136,373.14
Cost of 500 shares Metal Refining Co. of Indiana	40,350.00
Profit on exchange	$ 96,023.14
Taxable profit not in excess of cash and fair market value of "other property" (Sec. 112 (c)(1) Revenue Act of 1928)	
Cash—	17,293.14
Market value Glidden Co.	62,580.00
Profit taxable	$79,873.14

The Board of Tax Appeals held that the Glidden Company was a party to a reorganization within the statutory sense of the term and relied on its former decision in the case of *The Fifth Avenue Bank of New York, Exec., Estate of Bell,* 31 B. T. A. 945; (on appeal to U. S. Circuit Court of Appeals for the Third Circuit) and determined that both the shares of 7% prior preference stock of Glidden Company and the shares of 6% preferred stock of the Metals Refining Company of Ohio were received without recognition of gain and that the cash received must be recognized for taxation in accordance with the provisions of Section 112 (c)(1) of the said Revenue Act of 1928.

The question therefore is whether the Glidden Company is a party to a reorganization embracing the old Indiana
31 corporation and the new Ohio corporation within the meaning of Section 112 (b)(3) and 112 (i)(2) of the Revenue Act of 1928.

IV.

Assignments of Error.

The Commissioner says in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board

of Tax Appeals, manifest errors occurred and intervened to the prejudice of the Commissioner and the Commissioner assigns the following errors, and each of them which he avers occurred:

1. That the Board of Tax Appeals erred as a matter of law in holding and concluding that the Glidden Company was "a party to a reorganization."

2. That the Board of Tax Appeals erred as a matter of law in holding and concluding that the Glidden Company was a party to a reorganization embracing the Metals Refining Company of Indiana and a new corporation organized under the laws of the State of Ohio within the meaning of Sections 112 (b) (3) and (4) and 112 (i) (2) of the Revenue Act of 1928.

3. That the Board of Tax Appeals erred as a matter of law in holding and deciding that the fair market value of shares of 7% prior preference stock in the Glidden Company was received by the taxpayers in 1929 in an exchange without recognition of gain.

4. That the Board of Tax Appeals erred as a matter
32 of law in holding and deciding that the fair market value of shares of 7% prior preference stock of the Glidden Company was received by the taxpayer in 1929 upon exchange was non-taxable within the meaning of Section 112 (b) (3) of the Revenue Act of 1928.

5. That the Board of Tax Appeals erred as a matter of law in not holding and deciding that the fair market value of the shares of 7% prior preference stock of the Glidden Company received by the taxpayers in an exchange, in addition to cash, was taxable gain within the meaning of Section 112 (c) (1) of the Revenue Act of 1928.

6. That the Board of Tax Appeals erred in not determining the deficiency in tax due from the taxpayer for the year 1929 to be in the amount of $7,420.05.

7. That the Board of Tax Appeals erred in determining that the deficiency in tax due from this taxpayer for the year 1929 was only $17.53.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, that a transcript of the record be prepared in accordance with the law and the rules of said Court for filing, and that appro-

priate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Sgd.) FRANK J. WIDEMAN
Frank J. Wideman,
Assistant Attorney General.

(Sgd.) ROBERT H. JACKSON
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney, Bureau of Internal Revenue.

33 United States of America }
District of Columbia. } ss.

CLAUDE R. MARSHALL, being duly sworn, says that he is a special attorney for the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) CLAUDE R. MARSHALL.

Sworn and subscribed to before me this 16th day of October, 1935.

GEORGE W. KRIES,
Notary Public.

My commission expires Nov. 16, 1937.

Nov. 5. 34 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—62930) • •

NOTICE OF FILING PETITION FOR REVIEW.

Board of Tax Appeals Filed Nov. 5, 1935.

To: David L. Krebs, Jr., Esq.
c/o Armour & Company,
Union Stock Yards,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of October, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of October, 1935.

(Sgd.) ROBT. H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 5 day of Nov. 1935.

D. L. KREBS, JR.,
(Seal) *Attorney for Respondent on Review.*

35 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

• • (Caption—62930) • •

NOTICE OF FILING PETITION FOR REVIEW.

Board of Tax Appeals. Filed Nov. 8, 1935.

To: Herman C. Groman,
7 Wildwood Road,
Hammond, Indiana.

You are hereby notified that the Commissioner of Internal Revenue did, on the 30th day of October, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Cir-

cuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 30th day of October, 1935.

(Sgd.) ROBT. H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 2 day of Nov. 1935.

(Signed) HERMAN C. GROMAN,
Respondent on Review.

39 UNITED STATES BOARD OF TAX APPEALS. Entered Dec. 1935.

* * (Caption—62930) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to January 29, 1936.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
Dec. 10, 1935.
jd

Now, February 19, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Jan. 29, 40 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—62930) * *

ODER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to March 2, 1936.

(Signed) EUGENE BLACK,
Member.

Dated: Washington, D. C.,
Jan. 29, 1936.
jd

Now, February 19, 1936, the foregoing order enlarging time certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

n. 21, 1936. 36 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—62930) * *

PRAECIPE FOR RECORD.

Board of Tax Appeals. Filed Jan. 21, 1936.

Received Jan. 21, 1936. U. S. Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause, in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceeding before the Board.
2. Pleadings before the Board,
(a) Petition, including annexed copy of deficiency letter;
(b) Answer.
3. Memorandum Opinion and Decision of Board promulgated and entered June 17, 1935.

4. Final decision or Order of Redetermination entered on August 8, 1935.

5. Petition for Review, together with Proof of Service of Notice of Filing petition for review, and of a copy of Petition for Review on taxpayer and on his counsel.

6. Orders enlarging time for prepartion of the evidence and for the transmission and delivery of record, not included in record.

7. This praecipe.

37 Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Seventh Circuit.

(Signed) HERMAN OLIPHANT,
Herman Oliphant,
General Counsel for the Department of the Treasury.

Date: January 9, 1936.

Service of a copy of the within Praecipe is hereby admitted this 14th day of January, A. D. 1936.

D. L. KREBS, JR.,
CRM-spt *Attorney for Respondent.*

38 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—62930) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 37, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 19th day of February, 1936.

B. D. GAMBLE,
(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 29, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the eighth day of May, 1936, upon which the following entitled cause was heard and determined:

Commissioner of Internal Revenue,
Petitioner,

vs.

Herman C. Groman,
Respondent,

No. 5779, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of March, A. D. 1937.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

Commissioner of Internal Revenue, *Petitioner,*
5779 *vs.*
Herman C. Groman,
} Petition for Review of Decision of the United States Board of Tax Appeals.

And, to-wit: On the twenty-sixth day of February, 1936, there was filed in the office of the Clerk of this court, a Motion as to Printing Record, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner,*
vs.
Herman C. Groman, *Respondent.*
} B. T. A. No. 62930.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner,*
vs.
Frank S. Betz, *Respondent.*
} B. T. A. 62931.

Guy T. Helvering, Commissioner of Internal Revenue, *Petitioner,*
vs.
Charles W. Wilson, *Respondent.*
} B. T. A. No. 62932.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
Mary Wilke, Executrix, Est. of William Wilke,
Respondent.
} B. T. A. No. 62933.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
Erwin L. Wilke,
Respondent.
} B. T. A. No. 62934.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
Martha Wilke,
Respondent.
} B. T. A. No. 62935.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
William Wilke, Jr.,
Respondent.
} B. T. A. No. 62936.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
C. H. Dehning,
Respondent.
} B. T. A. No. 62937.

MOTION.

Comes Now the Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, and Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully represents to the Court that the identical question of law is involved in each of the above cases; that the decision of this Court in one of

the cases will govern the decision in the others; that the cases were consolidated for hearing and decision before the United States Board of Tax Appeals; that the Board, in its Findings of Fact and Opinion, covered all of the cases above mentioned and that the record on appeal, which has been forwarded by the Clerk of the United States Board of Tax Appeals to the Clerk of this Court, is sufficient in each of the cases to fully present the question of law involved.

Wherefore, petitioner moves this Court that it enter an order that only the record in Docket No. 62930 be printed; further that further proceedings in Dockets Nos. 62931, 62932, 62933, 62934, 62935, 62936 and 62937 be suspended, until the determination of the Board of Tax Appeals becomes final, within the meaning of Section 1005 (a), Revenue Act of 1926, in Docket No. 62930, and that upon such final determination in Docket No. 62930, either party hereto may apply, upon written notice to the other party and upon this order and a certified copy of the final determination in Docket No. 62930, for an order directing judgment to be entered in the cases of petitions for review in Dockets Nos. 62931, 62932, 62933, 62934, 62935, 62936 and 62937, corresponding to the result in Docket No. 62930.

FRANK J. WIDEMAN,
Frank J. Wideman,
Assistant Attorney General.
ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Consented to:
DAVID W. KREBS, JR.,
Attorney for Respondents.

Endorsed: Filed February 26, 1936, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of February, 1936, the following further proceedings were had and entered of record, to-wit:

Wednesday, February 26, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
5779 *vs.*
Herman C. Groman,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5780 *vs.*
Frank S. Betz,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5781 *vs.*
Charles W. Wilson,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5782 *vs.*
Mary Wilke, Executrix, Est. of
William Wilke,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5783 *vs.*
Erwin L. Wilke,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5784 *vs.*
Martha Wilke,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5785 *vs.*
William Wilke, Jr.,
Respondent.

Commissioner of Internal Revenue,
Petitioner,
5786 *vs.*
C. H. Dehning,
Respondent.

Petitions for Review of Decisions of the United States Board of Tax Appeals.

ORDER.

Upon consideration of the Motion filed herein by the petitioner, praying that this Court, for the purpose of review by this Court, order that only the record in Cause No. 5779 be printed; and that further proceedings in Cause Numbers 5780, 5781, 5782, 5783, 5784, 5785 and 5786 be suspended until the determination of the Board of Tax Appeals becomes final, within the meaning of Section 1005(a), Revenue Act of 1926, in Cause Number 5779, and that upon such final determination in Cause Number 5779 either party hereto may apply, upon written notice to the other party and upon this order and a certified copy of the final determination in Cause Number 5779, for an order directing judgment to be entered in the cases of petitions for review in Docket Numbers 5780, 5781, 5782, 5783, 5784, 5785, and 5786, corresponding to the result in Cause Number 5779.

It is by this Court,

Ordered that said Motion be and it is hereby granted, and further ordered that said Motion and this Order be incorporated in the transcript of record printed in board of Tax Appeals Cause Number 5779.

And afterwards, to-wit: On the twenty-first day of March, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 5779. October Term, 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman.

The Clerk will enter our appearance as counsel for Respondent.

Egbert Robertson,
James C. Spence,
120 W. Adams St, Chicago

Endorsed: Filed March 21, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the third day of April, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779 October Term 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman.

The Clerk will enter our appearance as counsel for Petitioner.

ROBERT H. JACKSON,
Asst. Attorney General,
SEWALL KEY,
Special Asst. to. Atty. General,
Washington, D. C.

Endorsed: Filed April 3, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-third day of May, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779 October Term 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman,

The Clerk will enter our appearance as counsel for Petitioner:

HERMAN OLIPHANT,
G. C. Dept. of Treasury,
JOHN F. GREANEY,
Special Attorney,
Washington, D. C.

Endorsed: Filed May 23, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the first day of June, 1936, there was filed in the office of the Clerk of this court, an appearance of counsel for Petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779 October Term 1935.

Commissioner of Internal Revenue,

vs.

Herman C. Groman,

The Clerk will enter my appearance as counsel for Petitioner.

JOSEPH M. JONES,
Special Asst. to the Attorney General,
Washington, D. C.

Endorsed: Filed June 1, 1936. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the sixth day of October, 1936, of the October Term, in the year of our Lord one thousand nine hundred and thirty-six, and of our Independence the one hundred and sixty-first.

And afterwards, to-wit: On the twelfth day of November, 1936, the following further proceedings were had and entered of record, to-wit:

Thursday, November 12, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

Commisisoner of Internal Revenue,
5779 *vs.*
Herman C. Groman.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral arguments by Mr. Joseph M. Jones, counsel for Petitioner, and by Mr. James C. Spence, counsel for Respondent, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the sixteenth day of November, 1936, there was filed in the office of the Clerk of this court, a Motion for Leave to file Additional Authorities, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5779.

Commissioner of Internal Revenue,
Petitioner,
vs.
Herman C. Groman,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

MOTION.

Now comes Herman C. Groman, by Egbert Robertson and James C. Spence, his attorneys, and moves the court that leave be given to file instanter as an additional authority in this cause, Article 577 of Regulations 74 under the Revenue Act of 1928, and particularly that portion thereof underlined in the copy thereof attached to this motion, and that if said motion be granted, said attached copy be filed herein as such additional authority.

Said respondent shows that said excerpt from Regulation 74 is relevant and important in the decision of this cause and was, by inadvertence, not cited in the briefs filed herein or upon the oral argument herein.

EGBERT ROBERTSON,
JAMES C. SPENCE,
Attorneys for Respondent.

Endorsed: Filed November 16, 1936. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirtieth day of November, 1936, there was filed in the office of the Clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 5779. October Term, 1936, October Session, 1936.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
HERMAN C. GROMAN,
Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals.

November 30, 1936.

Before EVANS, *Circuit Judge,* and LINDLEY and BRIGGLE, *District Judges.*

EVANS, *Circuit Judge.* The Commissioner appeals from a ruling of the Board which held that the stock under consideration, received by respondent, was not taxable to him as gain because received in the course of a reorganization.

The Facts. Respondent was a stockholder in the Metals Refining Company, an Indiana corporation. The Glidden Company is an Ohio corporation. On January 29, 1929, the Glidden C. npany and all the stockholders of Metals Company entered into an agreement whereby all the stock of the Metals Company was to be transferred to a third company (Metals Refining Co. of Ohio), an Ohio corporation, to be formed by the Glidden Company. The consideration to the stockholders of Metals Company for the transfer was $153,036.66 cash; 5276 shares of 7% prior preferred stock of the Glidden Company at $105 per share; and 5000 shares of 6% cumulative preferred stock of the new company.

Each shareholder of the Indiana corporation, of which respondent was one, received the percentage of this total consideration that his stock holdings bore to the total outstanding stock of said Indiana company. Glidden Company paid cash for the common stock of the new Ohio company. It did not receive any of the preferred stock of this company. The Indiana company was dissolved. Its assets were valued at $1,207,046.66. It is admitted that the cash received by stockholders was taxable and also that respondent's proportion of the 5000 shares of the preferred stock of the new Ohio Company by him received was not taxable. The issue is limited to respondent's proportion of 5276 shares of preferred stock of Glidden Company.

Did the Board of Tax Appeals correctly hold that the Glidden Company was a party to a reorganization within the meaning of section 112 (i) (2) of the Revenue Act of 1928?

The pertinent reorganization sections are:

"SEC. 112 (a) GENERAL RULE. Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

"SEC. 112 (b) * * (3) STOCK FOR STOCK ON REORGANIZATION. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

"(4) SAME—GAIN OF CORPORATION. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization. * * *

"(5) (c) GAIN FROM EXCHANGES NOT SOLELY IN KIND. (1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

"(2) If a distribution made in pursuance of a plan of

reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property. * * *

"(i) DEFINITION OF REORGANIZATION. As used in this section and sections 113 and 115—

"(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

"(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

"(j) DEFINITION OF CONTROL. As used in this section the term 'control' means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

The recent decisions of the courts which have passed upon similar questions reject the respondent's contention that he was within the exemption of the reorganization section. In other words, the following cases, while not exactly in point, are persuasive. *Bus and Transportation Co.* v. *Helvering*, 296 U. S. 387; *G. & K. Manufacturing* v. *Helvering*, 296 U. S. 389; *Ballwood Co.* v. *Commissioner*, 84 F. (2d) 733.

Determinative of the question before us is the answer to the

question, Was Glidden a party to reorganization whereby the Indiana Company transferred its stock to the Ohio Company and the latter paid the stockholders of Indiana Company in cash, preferred stock of Ohio Company, and preferred stock of Glidden Company?

We see no reason for extending the meaning of the term "party" as it appears in section 112 (i) (2). To hold otherwise would be to usurp legislative functions. Congress has defined a party to a reorganization so as to permit a taxpayer to avoid what would otherwise be taxable income. It could have refused to allow such deductions altogether. Having exempted "gains" through reorganization, it could and did define reorganizations. In so doing it used the term "a party" referring to those who were in the reorganization. We must hold respondent to the definition which Congress specifically gave to the word "party." It would, we think, be a forced construction to assume that under such circumstances there were parties other than those defined by the statute. Respondent relies upon the exemption of the statute, but declines to abide by the Congressional definition of essential terms.

The conclusion here reached is confirmed if we view the transaction from another approach. Let us assume that we have a taxpayer who owns stock in a corporation which he sells to another corporation. He is paid partly in cash, chiefly in preferred stock of a third corporation, and the balance in preferred stock of a corporation which buys his stock. The price received is in excess of the cost of the stock to him. Is his gain taxable?

There can be no question about the correctness of an affirmative answer save for an alleged exception or exemption from the tax law due to the reorganization provision of the act. The cash received, of course, is not exempt. The taxpayer does not question the tax upon the cash by him received. The Government concedes the soundness of the taxpayer's claim of exemption so far as the stock of the acquiring corporation is concerned. In the face of this concession this item like the cash item is out of the picture. As to the stock of a third company, even though it be a parent company, there seems no reason for exempting it any more than could be advanced for exempting the cash. Instead of preferred stock of the third company, it might have been bonds of the third or a fourth company, or real estate or physical personal property. The reason for exempting the stock of the purchasing company does not apply.

Our conclusion, however, is based not upon the reasons for Congressional action, but upon the fact that Congress, in exempting gains derived through the transfer of stock which transfers are but a part of reorganizations, saw fit to define with particularity the terms "reorganization" and "parties to reorganization." As we apply these definitions to the facts before us, we are impelled to the conclusion that the Glidden preferred stock was not exempted.

The order is reversed, with directions to proceed in accordance with the views herein expressed.

Endorsed: Filed November 30, 1936. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the thirtieth day of November, 1936, the following further proceedings were had and entered of record, to-wit:

Monday, November 30, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

5779 Commissioner of Internal Revenue, *vs.* Herman C. Groman. } Petition for Review of Decision of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the Record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the decision entered in this cause on August 8, 1935, by the United States Board of Tax Appeals be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to proceed in accordance with the views expressed in the Opinion of this court.

And afterwards, to-wit: On the nineteenth day of December, 1936, there was filed in the office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the seventh day of January, 1937, the following further proceedings were had and entered of record, to-wit:

Thursday, January 7, 1937.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. Walter C. Lindley, District Judge.
Hon. Charles G. Briggle, District Judge.

Commissioner of Internal Revenue, 5779 *vs.* Herman C. Groman.	Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the court that the Petition for a Rehearing is this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-first day of January, 1937, the Mandate of this court issued to the Clerk of the United States Board of Tax Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 33 to 48, inclusive, contain a true copy of the proceedings had and papers filed (excepting Briefs of counsel and Petition for a Rehearing); in the case of

Commissioner of Internal Revenue,
Petitioner,

vs.

Herman C. Groman,
Respondent,

No. 5779, October Term, 1936, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of March, A. D. 1937.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S
FILED
APR 5 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. [redacted] 21

HERMAN C. GROMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION OF HERMAN C. GROMAN FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

EGBERT ROBERTSON,
JAMES C. SPENCE,
Attorneys for Petitioner.

DAVID L. KREBS,
HENRY L. MCINTYRE,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PETITION: PAGE

Caption 1
Judgment below 1
Questions presented 1
Statute involved (included in QUESTIONS PRESENTED) 2
(also set forth in Appendix) 41, 42
Statement 2
Reasons for granting writ 3
Specification of errors 5
Prayer 5

BRIEF:

Opinions below 7
Jurisdiction 7
Statement of the case 8
Specification of errors to be urged 10
Status of lower court decisions 11
Summary of argument 12
Argument:
Point A: Section 112(i)(2) of the 1928 Act is not an exclusive definition of the term "a party to a reorganization" 14
Point B: In determining whether a corporation is a party to a reorganization the criteria are participation and continuity of interest in the assets transferred 20
Point C: Glidden was a party to the reorganization between Indiana and Ohio 24
Point D: The transaction here involved is in substance a reorganization between Glidden and Indiana within the meaning of Section 112 (i)(1) of the Revenue Act of 1928 28
Conclusion 38
Appendix (Reprint of relevant sections of the Revenue Act of 1928) 41, 42

Table of Cases Cited.

Ballwood Co. v. Commissioner, 84 F. (2d) 733..... 19
Bashford, Raymond I., 33 B. T. A. 10.....4, 18, 25
Burnet v. Commonwealth Improvement Co., 287 U. S. 415..... 30
Bus and Transport Securities Corp. v. Helvering, 296 U. S. 391.....4, 19, 23
C. H. Mead Coal Co. v. Commissioner, 72 F. (2d) 22.....11, 12, 23, 27
Centmont Corporation v. Marsch, 68 F. (2d) 460..... 34
Chicago, Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic Association, 247 U. S. 490.....36, 37
Claude Neon Lights, Inc., 35 B. T. A. No. 63.....3, 4, 18
Commerce Trust Co. v. Woodbury, 77 F. (2d) 478..... 34
Commissioner v. Bashford, 87 F. (2d) 827.....3, 11, 12, 17, 20, 22
Commissioner v. Fifth Avenue Bank, Executor, 84 F. (2d) 787.....3, 11, 12, 17, 24
Commissioner v. Groman, 86 F. (2d) 670..... 11
Cortland Specialty Co. v. Commissioner, 60 F. (2d) 937..... 27
Duparquet Co. v. Evans, 297 U. S. 216..... 7
Fifth Avenue Bank, Executor, 31 B. T. A. 945.....4, 18
G & K Manufacturing Co. v. Helvering, 296 U. S. 389.....4, 19
Gregory v. Helvering, 293 U. S. 465..... 37
Gulf Oil Corporation v. Lewellyn, 248 U. S. 71..... 30
H. H. Miller Industries Co. v. Commissioner, 61 F. (2d) 412.....34, 35
Helvering v. Bliss, 293 U. S. 144..... 17

Helvering v. Minnesota Tea Co., 296 U. S. 378 ..... 4, 15, 17, 19, 23, 26, 29
Helvering v. Watts, 296 U. S. 387 ..... 4, 17, 23
Independent Oil Company, 35 B. T. A. 32 ..... 3, 4
Miller v. Commissioner, 84 F. (2d) 415 26
Morrissey v. Commissioner, 296 U. S. 344 17
Munson S. S. Line v. Commissioner, 77 F. (2d) 849 ... 32, 33
Nelson Co. v. Helvering, 296 U. S. 374 ..... 4, 19, 23
New Colonial Ice Co. v. Helvering, 292 U. S. 435 31
North Jersey Title Insurance Co. v. Commissioner, 84 F. (2d) 898 31
Osburn California Corp. v. Welch, 39 F. (2d) 41 35
Pinellas Ice Co. v. Commissioner, 287 U. S. 462 ..... 4, 15, 22, 23, 26
Sage v. Commissioner, 83 F. (2d) 221 ..... 3, 11, 18
Southern Pacific Co. v. Lowe, 247 U. S. 330 29
Trustees System Co. of Pennsylvania v. Payne, 65 F. (2d) 103 34
Tulsa Oxygen Co., 18 B. T. A. 1283 4
United States v. Delaware, Lackwanna and Western R. R. Co., 238 U. S. 516 37
United States v. Lehigh Valley Coal Co., 220 U. S. 247 . 37
Weiss v. Stearn, 265 U. S. 242 37
Woodard, John S., 30 B. T. A. 1216 ..... 4, 18

Statutes Cited.

Judicial Code, as amended; Sec. 240 (a) 7
Revenue Act of 1924, Sec. 203 (h) (2) 16
Revenue Act of 1926, Sec. 2 (b) 15
Sec. 203 (h) (1) 11, 16
Revenue Act of 1928, Sec. 112 (b) (3) 2, 5, 10
Sec. 112 (c) (1) 2, 5, 10, 11
Sec. 112 (i) ... 1, 2, 3, 4, 5, 10, 11, 12, 14, 15, 16, 19, 29, 38
Sec. 112 (j) 15
Sec. 701 (b) 15

Treasury Regulations Cited.

Reg. 65, Art. 1577 ..... 4, 16
Reg. 69, Art. 1577 ..... 4, 16
Reg. 74, Art. 577 ..... 4, 17
Reg. 77, Art. 577 4

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. _____

HERMAN C. GROMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, Herman C. Groman, respectfully files and submits this as his petition for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on November 30, 1936, reversing the judgment of the United States Board of Tax Appeals. Petition for rehearing, filed December 19, 1936, within the period allowed by the rules of the Circuit Court of Appeals, was entertained, and was denied on January 7, 1937. (R. 48.)

QUESTIONS PRESENTED.

1. Whether or not Section 112 (i) (2) of the Revenue Act of 1928 is an exclusive definition of the term "party to a reorganization."

2. Whether or not a corporation which organizes a sub-

sidiary corporation pursuant to an agreement with stockholders of a third corporation and causes all of the preferred stock of such subsidiary, together with 5,275 shares of prior preference stock of the parent corporation and an amount in cash, to be delivered to the stockholders of the third corporation in exchange for the transfer of their stock to the subsidiary, is a party to a reorganization within the provisions of Section 112 (b) (3), Section 112 (c) (1) and Section 112 (i) of the Revenue Act of 1928.*

Statement.

The Glidden Company (hereinafter called Glidden) contracted with all the stockholders of Metals Refining Company (hereinafter called Indiana) to organize a new subsidiary of Glidden (hereinafter called Ohio). The Indiana stockholders (of whom petitioner is one) were to transfer to Ohio all their stock in Indiana, and Glidden was to give them in exchange, directly and through Ohio, 5,275 shares of prior preference stock of Glidden, 5,000 shares of preferred stock of Ohio, and an amount of cash, computed under the contract terms, which Glidden was to pay Ohio for all the Ohio common stock. All this was done. (R. 13.) The cash received by the Indiana stockholders is concededly taxable to the extent of the gain included therein; the preferred stock of Ohio is concededly received without recognition of gain or loss; and whether the Glidden stock is so received depends upon whether Glidden was "a party to a reorganization" within the meaning of the Revenue Act of 1928; this question, in turn, depends upon the proper interpretation of the provisions of Sec. 112 (b) (3), Sec. 112 (c) (1), and Sec. 112 (i) of that act.

* The relevant sections are reprinted as an appendix to our brief.

Reasons for Granting Writ.

There is a direct conflict in the decisions of the Circuit Courts of Appeals in different circuits on the precise question here involved. In *Commissioner of Internal Revenue* v. *Fifth Avenue Bank, Executor,* 84 F. (2d) 787, the Third Circuit accepted the interpretation, stated by the Board of Tax Appeals and acquiesced in by the Commissioner, that Section 112 (i) (2) was an enumeration and inclusion of certain doubtful cases and not an exclusive definition of the term "a party to a reorganization." This interpretation was followed by the Board of Tax Appeals in *Independent Oil Company,* 35 B. T. A. 32, and in *Claude Neon Lights, Inc.,* 35 B. T. A., No. 63. In *Sage* v. *Commissioner,* 83 F. (2d) 221, the Second Circuit had placed upon the section the same interpretation. In the instant case the Seventh Circuit has interpreted the section in question as containing an exclusive Congressional definition of the words "a party to a reorganization." Since the decision in this case the Third Circuit, in *Commissioner of Internal Revenue* v. *Bashford,* 87 F. (2d) 827, has reasserted its viewpoint and has specifically disapproved and declined to follow the opinion of the Seventh Circuit in the case at bar, stating in the opinion:

> "It seems to us that this fact [that Section 112 (i) (2) is not an all-inclusive definition] was overlooked by the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Groman,* 86 F. (2d) 670, decided November 30, 1936. Consequently we cannot follow the reasoning of that case, but are constrained to hold that one who is a party to a reorganization transaction as that language is commonly understood is a party within the meaning of the statute."

There is involved in this case an important question of federal law which has not been, but which should be, set-

tled by this court. In the group of five cases decided by this court December 16, 1935 (*Nelson Co.* v. *Helvering,* 296 U. S., 374; *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378; *Helvering* v. *Watts,* 296 U. S. 387; *G. & K. Manufacturing Co.* v. *Helvering,* 296 U. S. 389; and *Bus & Transport Securities Corp.* v. *Helvering,* 296 U. S. 391), numerous questions involving the reorganization sections of various revenue acts were discussed and determined; but the precise question here raised (the interpretation of Section 112 (i) (2) of the 1928 Act) was not disposed of. We believe, however, that the decisions in *Nelson Co.* v. *Helvering* and *Helvering* v. *Minnesota Tea Co.* and the opinion in *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462 (pp. 469-70), are applicable decisions of this court, and that the decision of the Circuit Court of Appeals for the Seventh Circuit is probably in conflict therewith, since the interpretation of Section 112 (i) (2) in the instant case is inconsistent with the construction of Section 112 (i) (1) by this court in the cases cited. A specific and authoritative determination of the proper construction of this section is a matter of great importance in the construction of the taxing statutes, particularly since the same problem is presented under all the revenue acts since 1928.

The decision in this case is directly in conflict with the regulations of the Treasury Department in force from 1924 to 1933 (Reg. 65, Art. 1577; Reg. 69, Art. 1577; Reg. 74, Art. 577; Reg. 77, Art. 577) (quoted in our brief at p. 16) and the uniform holdings of the Board of Tax Appeals (*Tulsa Oxygen Co.,* 18 B. T. A. 1283; *John S. Woodard,* 30 B. T. A. 1216; *Fifth Avenue Bank of New York, Executor,* 31 B. T. A. 945; *Raymond I. Bashford,* 33 B. T. A. 10; *Independent Oil Co.,* 35 B. T. A. 32). In *Claude Neon Lights, Inc.,* 35 B. T. A., No. 63, the Board refers to this case as contrary to other authorities, and does not follow it.

Specification of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In reversing the decision and order of the Board of Tax Appeals.

2. In holding that Section 112 (i) (2) of the Revenue Act of 1928 is an exclusive definition of the words "a party to a reorganization."

3. In holding that the Glidden Company was not a party to a reorganization within the meaning of Section 112 (b) (3), Section 112 (c) (1), and Section 112 (i) of the Revenue Act of 1928.

4. In failing to hold that the prior preference stock of the Glidden Company received by petitioner was "stock or securities * * * in another corporation a party to the reorganization" within the meaning of the language of Section 112 (b) (3) and Section 112 (c) (1) of the Revenue Act of 1928.

5. In holding and finding that the prior preference stock of the Glidden Company received by petitioner was "other property" within the meaning of Section 112 (c) (1) and that petitioner's gain was recognizable to the extent of the value of these shares.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5779, Commis-

sioner of Internal Revenue *vs.* Groman, and that the said judgment of the said Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HERMAN C. GROMAN,
By EGBERT ROBERTSON,
JAMES C. SPENCE,
His Attorneys.

DAVID L. KREBS,
HENRY L. MCINTYRE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Board of Tax Appeals in this case was filed on June 17, 1935, and is not reported, but may be found at pages 10-18 of the record herein.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears in the record at pages 43-47, and is reported in 86 F. (2d) 670.

II.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals was entered on November 30, 1936. (R. 43.) Petition for rehearing was filed December 19, 1936 (R. 48), within the time provided by the Rules of the Circuit Court of Appeals, was entertained, and was denied January 7, 1937. (R. 48).

2. The jurisdiction of this court is based upon Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stats. 938; 28 U. S. C. A. § 347.

3. Since the case is not one of those reviewable by appeal, it seems unnecessary to cite decisions in support of the jurisdiction of the court by certiorari, as to which the statute confers an unlimited discretion. The propriety of the exercise of such jurisdiction in this case is supported by the opinion in *Duparquet Co.* v. *Evans,* 297 U. S. 216. It is there said:

> "Because of this conflict [between Circuits] and because of the importance of removing doubt as to the meaning of the statute, a writ of certiorari was granted by this court" (p. 217).

III.

STATEMENT OF THE CASE.

The facts are summarized in the petition, but we think it advisable to set them out here more in detail.

The Glidden Company was an Ohio corporation, engaged in the manufacture of paints and varnishes. Metals Refining Company was an Indiana corporation, engaged in the business of refining lead and in the production of various alloys. (R. 11.) In January, 1929, Glidden entered into a contract with all the stockholders of Indiana, which contract recited that,

> "The shareholders are desirous of merging and consolidating the properties of their company with the Glidden Company and with a corporation to be incorporated and organized under the laws of Ohio, such merger or consolidation to be effected in the manner hereinafter set forth." (R. 11),

and provided that the shareholders of Indiana should transfer their shares to an Ohio corporation to be organized by Glidden with a capitalization of 5,000 preferred shares and "such number of common shares, par or non-par, as Glidden Company may determine, all of which shall be acquired by Glidden Company for a cash consideration sufficient to meet the requirement of Section 7 [which provided for the consideration to be paid the shareholders of Indiana]." (R. 12.) Glidden in turn agreed to organize and incorporate the Ohio Company and to cause the assets of Indiana to be transferred to the new company after the stock in Indiana had been received by Ohio.

The contract further provided that Glidden, as a consideration for such consolidation, would issue and deliver, or cause to be delivered, to the Indiana stockholders, securities and cash as follows:

"The sound value of fixed assets of the Indiana Com-

pany is to be determined by the American Appraisal Company of Milwaukee, Wisconsin. The good-will of the Indiana company for the purpose of this agreement shall be valued at Five Hundred Thousand Dollars ($500,000). The book value of all other assets as of March 1, 1929 * * * as approved by auditors selected by the Glidden Company shall be used.

Against the total value of the assets so determined there shall be issued—

(a) Up to 5,275 shares of 7% prior preference stock of the Glidden Company on the basis of One Hundred Five Dollars ($105) per share.

(b) Up to 5,000 shares of the 6% cumulative preferred stock of the new Ohio Company, hereinbefore referred to, on the basis of One Hundred Dollars ($100) per share.

(c) After deducting from the total value of such assets the amount of prior preference stock and preferred stock issued on the basis above set forth, the remaining value of such assets shall represent the amount of cash payable to the shareholders of the Indiana Company on the consummation of such consolidation." (R. 13.)

This contract was performed and Indiana was thereafter dissolved. (R. 13.) Petitioner owned 500 shares of stock in Indiana and by virtue of the above transactions, he received in exchange therefor 565 shares of preferred stock of Ohio, 596 shares of prior preference stock of Glidden, and $17,293.14. (R. 7-8.)

As the Circuit Court of Appeals said:

> "It is admitted that the cash received by stockholders was taxable and also that respondent's [petitioner's] proportion of the 5,000 shares of the preferred stock of the new Ohio Company by him received was not taxable. The issue was limited to respondent's [petitioner's] proportion of 5,276 shares of preferred stock of Glidden Company." (R. 44.)

The Commissioner determined that the Glidden Company was not a party to the reorganization. (R. 5-8.) The Board

of Tax Appeals determined otherwise and held that the Glidden stock was received by petitioner without recognition of gain. (R. 18.) This decision of the Board of Tax Appeals was reversed by the Circuit Court of Appeals. (R. 47.)

Proceedings in the cases of six other stockholders of Indiana as to whom petitions for review of the decision of the Board of Tax Appeals were filed in the Circuit Court of Appeals for the Seventh Circuit were suspended by order of the Circuit Court of Appeals to abide the final decision in this case. (R. 37.)

IV.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In reversing the decision and order of the Board of Tax Appeals.

2. In holding that Section 112 (i) (2) of the Revenue Act of 1928 is an exclusive definition of the words "a party to a reorganization."

3. In holding that the Glidden Company was not a party to a reorganization within the meaning of Section 112 (b) (3), Section 112 (c) (1), and Section 112 (i) of the Revenue Act of 1928.

4. In failing to hold that the prior preference stock of the Glidden Company received by petitioner was "stock or securities * * * in another corporation a party to the reorganization" within the meaning of the language of Section 112 (b) (3) and Section 112 (c) (1) of the Revenue Act of 1928.

5. In holding and finding that the prior preference stock of the Glidden Company received by petitioner was "other property" within the meaning of Section 112 (c) (1) and that petitioner's gain was recognizable to the extent of the value of these shares.

V.

STATUS OF LOWER COURT DECISIONS.

The question of who is a party to a reorganization has been considered in five Circuit Courts of Appeals decisions:

C. H. Mead Coal Co. v. *Commissioner,* 72 F. (2d) 22, (C. C. A. 4, 1934);

Sage v. *Commissioner,* 83 F. (2d) 221, (C. C. A. 2, 1936);

Commissioner v. *Fifth Avenue Bank, Executor,* 84 F. (2d) 787, (C. C. A. 3, 1936);

Commissioner v. *Groman,* 86 F. (2d) 670, (C. C. A. 7, 1936—this case);

Commissioner v. *Bashford,* 87 F. (2d) 827, (C. C. A. 3, 1937).

The Seventh Circuit in the instant case held that Section 112 (i) (2) is an exclusive definition of the words "a party to a reorganization" and that there can be no parties to a reorganization other than those there enumerated. The Second, Third and Fourth Circuits have held that this is not an exclusive definition. The Second Circuit has suggested that "a party to a reorganization" is one of the necessary parties to a transaction detailed in Section 203 (h) (1) of the 1926 Act, (Section 112 (i) (1) of the 1928 Act) (*Sage* v. *Commissioner,* 83 F. (2d) at 223, 224). The Third Circuit has emphasized as tests (1) the degree of participation taken in the reorganization (*Commissioner* v.

Bashford, 87 F. (2d) at 830) and (2) the presence of continuity of interest in the assets transferred (*Commissioner* v. *Fifth Avenue Bank, Executor,* 84 F. (2d) at 789). The Fourth Circuit seems to have relied upon both these tests (*C. H. Mead Coal Co.* v. *Commissioner,* 72 F. (2d) at 29).

VI.

SUMMARY OF ARGUMENT.

Point A. Section 112 (i) (2) of the 1928 Act is not an exclusive definition of the term "a party to a reorganization." The Revenue Act itself provides otherwise. The language is not that of a definition. This court has otherwise interpreted like language in Section 112 (i) (1). Treasury regulations under prior acts, the interpretation of which Congress has adopted by the re-enactment of this section after the promulgation of such regulations, specifically repudiate this interpretation. Circuit Courts of Appeals in other circuits, the uniform decisions of the Board of Tax Appeals, and the views of text-writers are all to the contrary.

Point B. In determining whether a corporation is a party to a reorganization the applicable criteria are the participation of such corporation in the reorganization and a continuity of interest of the transferors, through ownership of stock in the corporation whose participation is involved, in the assets transferred.

Point C. Glidden was a party to the reorganization between Indiana and Ohio because it participated therein, and, indeed, dominated and directed the proceedings, and because the Indiana stockholders received and retained an interest in the assets transferred by Indiana through the acquisition by them of stock in Glidden representing a defi-

nite and material interest in Glidden, and through Glidden in Ohio, and a substantial part of the value of the transferred assets.

Point D. The transaction here involved may logically be regarded as a direct reorganization between Glidden and Indiana, and Ohio may be treated as an instrumentality and *alter ego* of Indiana, whose corporate entity may under settled rules of decision be disregarded to give effect to the substance rather than the form of the transaction.

VII.

ARGUMENT.

Point A.

SECTION 112 (i) (2) OF THE 1928 ACT IS NOT AN EXCLUSIVE DEFINITION OF THE TERM "A PARTY TO A REORGANIZATION."

Section 112 (i) of the Revenue Act of 1928 provides:

> "(i) DEFINITION OF REORGANIZATION. As used in this section and sections 113 and 115—
>
> "(1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.
>
> "(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

The Circuit Court of Appeals herein has concluded that in Section 112 (i) "Congress • • • saw fit to define with particularity the terms 'reorganization' and 'parties to a reorganization'." (R. 47.) We do not quarrel with the first conclusion but we cannot agree that Congress has attempted to *define* even vaguely the term "a party to a reorganization."

Section 701 (b) of the Revenue Act of 1928 provides:

> "The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined."

A similar provision is also found in Section 2 (b) of the Revenue Act of 1926. So, even if Section 112 (i) (2) can be regarded as a "definition" at all, it cannot be considered as a complete and exclusive one in view of this specific language of the statute. But it is by no means certain that Congress intended to define anything when it enacted Subsection 112 (i) (2). Section 112 (i) is entitled "DEFINITION OF REORGANIZATION." There is nothing in this designation to indicate that it was also the intention of Congress to define "a party to a reorganization."

Section 112 (i) (1) begins "The term 'reorganization' *means* * * *." The distinction is clear cut between the use of the word "means" here and the use of the word "includes" in Section 112 (i) (2) which begins "The term 'a party to a reorganization' *includes* * * *." Section 112 (j) is entitled "DEFINITION OF CONTROL." This section again begins "As used in this section, the term 'control' *means* * * *." It is very apparent, therefore, that Congress has carefully distinguished between the word "means" and the word "includes" in this statute, and that the word "includes" is not used in a restrictive or limiting sense.

This court has marked the distinction in the opinions in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, and *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462. Those cases concerned the interpretation of the words "merger or consolidation (*including* the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes

of stock of another corporation, or substantially all the properties of another corporation)'' contained in Section 112 (i) (1) of the 1928 Act and the same words in Section 203 (h) (1) (a) of the 1926 Act. It was urged in those cases that the words within the parenthesis following the word ''including'' were restricted and limited by the words ''merger'' or ''consolidation'' immediately preceding the parenthesis, but this court rejected that contention and said (296 U. S. at 385, 287 U. S. at 469-470):

> ''The words within the parenthesis may not be disregarded. They expand the meaning of 'merger' or 'consolidation' so as to include some things which partake of the nature of a merger or consolidation but are beyond the ordinary and commonly accepted meaning of those words—so as to embrace circumstances difficult to delimit but which in strictness cannot be designated as either merger or consolidation.''

The provisions of Section 112 (i) (2) of the Revenue Act of 1928 first appeared in their present form in Section 203 (h) (2) of the Revenue Act of 1924. Regulations 65 relating to income taxes under the Revenue Act of 1924 contained Article 1577, reading as follows:

> ''The term 'a party to a reorganization,' as used in sections 201, 203, and 204 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. *This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.*'' (Italics added.)

The exact language of Section 203 (h) (2) of the Revenue Act of 1924 (which is identical with the language of Section 112 (i) (2) of the 1928 Act) was re-enacted in the Revenue Act of 1926, and Regulations 69 under the 1926 Act contain the same Article 1577 above quoted. Exactly the same lan-

guage is found in Article 577 of Regulations 74 under the 1928 Act.

Congress, by enacting the 1926 and 1928 Acts in the same language as that of the 1924 Act, has adopted the interpretation given this language by the original treasury regulations. The regulations construing the 1924 and 1926 Acts must have been well in mind when the 1928 Act was enacted. This court has recognized the effect of such Congressional re-enactment of a statute as an approval of the construction contained in the income tax regulations, in the cases of *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, at 384; *Helvering* v. *Watts*, 296 U. S. 387, at 389, *Morrissey* v. *Commissioner*, 296 U. S. 344 at 355, and *Helvering* v. *Bliss*, 293 U. S. 144 at 151.

The opinion of the Circuit Court of Appeals is clearly contrary to these regulations and the will of Congress as indicated by the re-enactment of this same provision after the regulation had been in effect for four years.

The opinion of the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Fifth Avenue Bank, Executor*, 84 F. (2d) 787, decided prior to the decision of the Circuit Court of Appeals of the Seventh Circuit herein, contains the following at page 789:

> "The Board construes (i) (2) as not all inclusive, and quotes Regulations 74, Art. 577, which says that it 'simply enumerates certain cases with respect to which doubt might arise'."

The same court, in *Commissioner* v. *Bashford*, 87 F. (2d) 827, decided subsequent to the decision of this case by the Circuit Court of Appeals for the Seventh Circuit, again said:

> "The definition contained in the statute is, as this court pointed out in *Commissioner of Internal Revenue* v. *Fifth Avenue Bank of New York*, 84 F. (2d) 787, 789, not an all-inclusive one, but, as petitioner stated in

> his interpretive regulations (Article 577, Regs. 74), it 'simply enumerates certain cases with respect to which doubt might arise.' It seems to us that this fact was overlooked by the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Groman,* 86 F. (2d) 670, decided November 30, 1936. Consequently we cannot follow the reasoning of that case, but are constrained to hold that one who is a party to a reorganization transaction as that language is commonly understood is a party within the meaning of the statute."

The Circuit Court of Appeals for the Second Circuit has also reached this conclusion. In *Sage* v. *Commissioner,* 83 F. (2d) 221, after setting forth Section 203 (h) (2) of the Revenue Act of 1926, that court says:

> "Although the Kimberly Company does not fall within this Section, Article 1577 provides: 'This definition is not an all inclusive one, but simply enumerates certain cases with respect to which doubt might arise.'
>
> "We can therefore look to the definition of a reorganization to determine the status of the Kimberly Company."

The Board of Tax Appeals has also taken this view in numerous cases. The opinion in the instant case, when it was before the Board (R. 11-18), as well as the opinions in the *Fifth Avenue Bank* (31 B. T. A. at 951), *Bashford* (33 B. T. A. at 18) and *Claude Neon Lights, Inc.* (35 B. T. A., No. 63 at 10) cases when they were before the Board, interpreted the statute in question as we contend. A similar statement of the Board's view appears in *John S. Woodard,* 30 B. T. A. 1216, at 1223-24.

In addition to the lower federal courts and the Board of Tax Appeals, text writers have reached the conclusion that this statutory language is not exclusive. (Baar and Morris, "Hidden Taxes in Corporate Reorganizations" (1935), page 148; Paul and Mertens, "Law of Federal Income Taxation" (1934), Vol. 2, page 211.)

The authorities cited in the Seventh Circuit opinion do not sustain that court's view. In *Bus and Transport Securities Corp.* v. *Helvering,* 296 U. S. 391, this court held there was no reorganization at all. In *G. & K. Manufacturing Co.* v. *Helvering,* 296 U. S. 389, this court remanded the cause for a determination of factual questions which would decide whether there was a reorganization, but who were parties to the reorganization (if there was one) was not involved. *Ballwood Co.* v. *Commissioner,* 84 F. (2d) 733, does not discuss the language of Sec. 112 (i) (2), but the decision follows the decision in *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, and is squarely in accord with our contention here.

In conclusion, we wish to point out that this court has in effect held that there can be parties to a reorganization other than those enumerated in Section 112 (i) (2). For in the *Minnesota Tea* case (296 U. S. 378), Grand Union acquired all of the property of Minnesota Tea in return for 7½ per cent of its (Grand Union's) stock. Obviously, Grand Union is not "a corporation resulting from a reorganization" and there has been no "acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation." Yet it was held in the *Minnesota Tea* case that the shares of Grand Union were received without recognition of gain. Although the point was not discussed in the opinion, this holding necessarily means that Grand Union was "a party to a reorganization," since otherwise its stock would not have fallen within Section 112 (b) (4).

The effect of the decision in *Nelson Co.* v. *Helvering,* 296 U. S. 374 is the same, since that case involved solely the acquisition of property in return for stock.

We submit that these decisions are determinative of this point on principle, and are applicable here, and that the decision of the Circuit Court of Appeals is in conflict therewith, and erroneous.

Point B.

IN DETERMINING WHETHER A CORPORATION IS A PARTY TO A REORGANIZATION, THE CRITERIA ARE: (1) PARTICIPATION; (2) CONTINUITY OF INTEREST (THROUGH STOCK OWNERSHIP) IN THE ASSETS TRANSFERRED.

1. *Participation as a Test.*

If our argument is correct thus far, the next problem is to determine what are the essentials to qualify a corporation as a party to a reorganization within the meaning of that phrase as used in Section 112. Beginning with the literal sense of the words, we find that Funk and Wagnalls define "party" as "one concerned in or privy to a matter". "*Law* * * * one who is related to or united with another or others in * * * a transaction." Webster says "party" is "one concerned in an affair; a participator; as a *party* in interest, * * * a *party* to a plot",

Clearly under the facts in this case, Glidden comes within this dictionary definition, since it played such an active part in the transactions involved.

But did Congress have in mind, when it used this phrase "party to a reorganization" something different from the usual meaning of the words? The Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Bashford*, 87 F. (2d) 827, says:

> "We * * * are constrained to hold that one who is a party to a reorganization transaction as that language is commonly understood is a party within the meaning of the statute. * * * we fully agree with the Board that a corporation so intimately connected with the reorganization of the other corporations as

was Atlas in this case, is a party to the reorganization within the commonly understood meaning of that phrase, although not reorganized itself." (Page 830.)

The Board in this case had said (33 B. T. A. 17-18):

"In short, Atlas was the main spring of the entire proceeding and without its participation there would have been no reorganization and consolidation into the new company."

The text writers also emphasize the activity of a particular corporation as indicating its relationship to the reorganization. Thus in Baar and Morris, "Hidden Taxes in Corporate Reorganizations", it is said, at page 147:

"Where, however, a corporation is the principal or dominating actor in the particular transaction which constitutes the reorganization, and *perhaps particularly where it nominates an affiliated corporation to play a role which clearly qualifies the subsidiary as a party,* the other corporation may be recognized as a party to the reorganization even though it does not qualify under the statutory definition or any of the established rules." (Italics added.)

And in Paul and Mertens, "Federal Income Taxation" (1936 Supp. to Volume II) the following appears at page 68:

"Where the corporation is so intimately connected with the reorganization of other corporations that the reorganization depends on its efforts or support, then such corporation is a party to the reorganization although it is not reorganized itself."

In applying this test, which we, for brevity sake, will call "the participation test", we may concede that not every minor participant in a reorganization satisfies this requirement. Thus, as Paul and Mertens point out in Volume II of their work on Income Taxation (page 213):

"It was clearly not the Legislature's intent, for instance, to permit non-recognition of gain upon the exchange of stock of corporation A for the stock of corporation C (which was received in addition to stock of

corporation B) where the reorganization takes the form of a merger of corporation A into corporation B and where corporation C is a minor and incidental participant in the reorganization."

The opinion of the Third Circuit in *Commissioner* v. *Bashford*, 87 F. (2d) 827, sets forth a good general summary of the salient facts which indicate the degree of participation which a particular corporation has taken in the reorganization of another corporation, and points out generally where the line is to be drawn between cases of insufficient participation and those in which the third corporation is in reality the motivating force and *sine qua non* of the reorganization. Thus, the findings of fact of the Board are there set forth as follows:

> "That the entire idea and plan of reorganization, was conceived by Atlas; that it was in the line of Atlas' business; and that its promotion and execution were entrusted to its agents, Seligman and Fletcher under general instructions. The plan was developed and formed by Atlas and its agents; cash and its own stock necessary to the accomplishment of the transaction were furnished by Atlas; and it became the owner of the majority of the voting stock and of all of the preferred stock of the new company. In short, Atlas was the main spring of the entire proceeding and without its participation there would have been no reorganization and consolidation into the new company."

Thus in the discussions of the problem found in the decisions and the text-books, considerable emphasis seems to be placed on the extent or degree of participation of the corporation in question.

2. *Continuity of Interest as a Test.*

An important consideration in all reorganization tax cases as crystallized by the opinions of this court is the "continuity of interest" which must be maintained by the transferror in the assets transferred.

Pinellas Ice Co. v. *Commissioner*, 287 U. S. 462.

Helvering v. *Minnesota Tea Co.*, 296 U. S. 378.
Helvering v. *Watts*, 296 U. S. 387.
Nelson Co. v. *Helvering*, 296 U. S. 374.
Bus and Transport Securities Corp. v. *Helvering*, 296 U. S. 391.

Thus in the *Pinellas* case the court (287 U. S. at 470) says:

> "Certainly we think that to be within the exemption *the seller must acquire an interest in the affairs of the purchasing company* more definite than that incident to ownership of its short-term purchase-money notes." (Italics added.)

and in the *Minnesota Tea Co.* case (296 U. S. at 386):

> "The transaction here was no sale, but partook of the nature of a reorganization in that the seller acquired a definite and substantial interest in the purchaser.
>
> "True it is that the relationship of the taxpayer to the assets conveyed was substantially changed, but this is not inhibited by the statute. Also, a large part of the consideration was cash. This, we think, is permissible so long as the taxpayer received an interest in the affairs of the transferee which represented a material part of the value of the transferred assets."

As it was phrased by the Circuit Court of Appeals for the Fourth Circuit in *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22, 29:

> "If there is not merely a sale of the assets, but a *continuity of interest* on the part of the old stockholder *in the new business*, so that the old stockholder does not actually liquidate his holdings, *but continues to be a participant in the enterprise* without actual realization of profit, and if the transaction partakes of the nature of a merger or consolidation in a liberal view, it is not the purpose of the Act to recognize either a gain or a loss in the transaction, and no such gain or loss will affect the income tax of the stockholder until the new stock or securities are disposed of." (Italics added.)

The same test was applied in *Commissioner* v. *Fifth Avenue Bank, Executor,* 84 F. (2d) 787 at 789.

Accordingly, it seems inevitable that where, in a transfer of assets of Corporation B, Corporation A has furnished the initiative and the means, and has directed the procedure, and where the former stockholders of Corporation B, *through acquisition of stock in Corporation A,* receive and retain a substantial interest in the property and business formerly operated by Corporation B, there is a reorganization, and Corporation A is a necessary party to it.

Point C.

GLIDDEN WAS A PARTY TO THE REORGANIZATION BETWEEN INDIANA AND OHIO.

1. *Glidden Participated in the Reorganization.*

It is conceded that the facts in this case, from one point of view, involve a reorganization between Ohio and Indiana (R. 23). Applying then, the participation test to Glidden in order to determine whether it was a party to this reorganization, we find that the facts show that the contract which is the basis of and gave rise to and contained the plan for the entire reorganization was entered into and executed by Glidden (R. 11-13). The reorganization was in the furtherance of Glidden's business; Ohio was organized by Glidden in accordance with the terms of the contract; Glidden determined the capital structure of Ohio and acquired control of Ohio through the purchase of all its voting stock; Glidden had charge of the audits to determine the value of the Indiana assets; Glidden furnished the necessary cash to pay for Indiana stock and issued its own prior preference stock to Indiana shareholders; and finally, Glidden caused the assets of ~~Ohio~~ INDIANA to be transferred to Ohio, and paid the quarterly dividends upon the preferred stock of Ohio. (R. 4, 13-14, 44.)

To use the language of the Board of Tax Appeals in the *Bashford* case, Glidden, even as Atlas, "was the main spring of the entire proceeding and without its participation there would have been no reorganization and consolidation into the new company" (33 B. T. A. 17-18).

2. *The Continuity of Interest in the Indiana Assets Was Preserved to the Indiana Stockholders by Virtue of Their Acquisition of the Glidden Stock.*

At the beginning of the transactions herein involved the shareholders of Indiana had an equity of $1,207,016.66 in the assets of the Indiana corporation, on the basis of the appraisal made pursuant to the contract between the Indiana stockholders and Glidden. When the reorganization was completed these same shareholders of Indiana had instead of their stock in Indiana $500,000.00 of preferred stock in Ohio, $553,980.00 of prior preference stock in Glidden and $153,036.66 in cash. Expressed in a different fashion, the shareholders' equity in the Indiana assets was now represented roughly, 13% by cash, 45% by prior preference stock in Glidden and 42% by preferred stock in Ohio.

As all of the assets of Indiana had been transferred to Ohio, the equity in the Indiana assets was then represented by the $500,000.00 worth of preferred stock received by the former stockholders of Indiana and 100 shares of common stock of Ohio owned by Glidden. This gave the 100 shares of common stock an equity, based on the appraisal, of $707,016.66. Thus there was a continuity of interest in the Indiana shareholders in the original Indiana assets, not only through their ownership of the Ohio stock but also through their ownership of the Glidden stock, since Glidden through its acquisition of the common stock of Ohio was the owner of all of the equity in the original Indiana assets not represented by the preferred stock of

Ohio. Accordingly, everything that the Indiana shareholders received, aside from cash, represented a substantial interest in the original assets of Indiana. And if they had not received any stock in Glidden they would have lost all their interest in $707,016.66 of the assets transferred.

This Court, in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, after referring to the rule laid down in *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462, that the transferror "must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short term purchase money notes" said that "this interest must be definite and material; it must represent a substantial part of the value of the thing transferred. This much is necessary in order that the result accomplished may genuinely partake of the nature of merger or consolidation".

In *Miller* v. *Commissioner*, 84 F. (2d) 415, the Circuit Court of Appeals for the Sixth Circuit, after discussing the *Minnesota Tea Co.* case, suggested the following definition:

> "In the commonly accepted legal sense, a substantial interest is something more than a merely nominal interest, and, in respect to corporations, a definite and material interest is an interest beyond what is usually referred to as represented by 'qualifying shares.'"

It is clear that the $553,980.00 of stock in Glidden acquired by Indiana stockholders represented "a definite and material interest" in Glidden. It was certainly not a merely nominal interest. It is equally clear that this Glidden stock represents "a substantial part of the value of the thing transferred" as the total value of the assets transferred was appraised at $1,207,016.66. Inasmuch as Glidden had acquired all the common stock of Ohio (representing $707,016.66 of Indiana's assets), the interest received by Indiana's shareholders in Glidden is just as definite and ma-

terial an interest in the "affairs of the purchasing company" and represents just as substantial a "part of the value of the thing transferred" as if Glidden had received the $707,016.66 of the assets themselves, rather than the equity in such assets in the form of this common stock. Since the common stock of Ohio carried all the voting power, Glidden was in complete control of Ohio and the stockholders in Glidden had an interest in the "affairs" of Ohio. This court in laying down the rule has not required that the interest retained be a stock interest in the purchasing corporation itself, but rather the interest must be an "interest in the *affairs* of the purchasing corporation." It cannot be doubted that holders of a substantial amount of stock in a parent corporation have a definite and material interest in the affairs of the parent's subsidiary. Hence, to use the language of the *Minnesota Tea Co.* opinion, everything necessary has been done so that "the result accomplished may genuinely partake of the nature of merger or consolidation". This result is accomplished through the acquisition by the petitioner of the Glidden stock. For this reason we feel that the receipt of the stock in Glidden constitutes just such an exchange as Congress intended should be tax-free.

The reorganization sections of the Revenue Acts since 1918 have been intended to relieve against oppressive and premature taxation where there has been a mere change in form as regards the interest of the taxpayer in his property. In *Cortland Specialty Co.* v. *Commissioner,* 60 F. (2d) 937, it is stated as follows:

> "Its purpose was to relieve those interested in corporations from profits taxes in excess where there was only a change in corporate form in which it was conducted without an actual realization of any gain from an exchange of properties. * * * Reorganization presupposes continuance of business under modified corporate forms". See also, *C. H. Mead Coal Co.* v. *Commissioner,* 72 F. (2d) 22, at 27-8.

The stockholders of Indiana at the completion of the transaction under scrutiny were clearly continuing the business under modified corporate forms—instead of acting in the form of Indiana, they were now acting in the form of Glidden and its wholly owned subsidiary, Ohio.

We have set forth and discussed above what appeals to us as the essential criteria in the mind of Congress and as developed by the decisions as to who were to be considered parties to a reorganization. It may be argued by the Commissioner that one of the tests that should be considered in determining whether a corporation is a party to a reorganization is whether such corporation's structure is directly affected in some manner. It is true that in numerous reorganizations unquestionably coming within the statutory definition, the corporate structure is either directly affected or there is a transfer of a substantial portion of the outstanding stock of such corporation. If this test is applied to Glidden it will be found that its corporate structure is affected. An additional 5,275 shares of preferred stock were issued. This increased its outstanding preferred stock by more than 7 per cent. And in the *Minnesota Tea* case 7½ per cent of the Grand Union stock was exchanged.

Point D.

THE TRANSACTION HERE INVOLVED, IN SUBSTANCE, IS A REORGANIZATION BETWEEN GLIDDEN AND INDIANA WITHIN THE MEANING OF SECTION 112 (i) (1) OF THE REVENUE ACT OF 1928.

Thus far we have treated the facts of this case as though they involved a reorganization between Ohio and Indiana, but the case may be equally regarded as a reorganization between Glidden and Indiana.

The preamble of the contract entered into between Glid-

den and the shareholders of Indiana recites that "the shareholders are desirous of merging and consolidating the properties of their company with the Glidden Company and with a corporation to be incorporated and organized under the laws of Ohio, such merger or consolidation to be effected in the manner hereinafter set forth". Thus it appears that at the outset the declared purpose was to effect a merger between Glidden and Indiana. The manner by which this plan was carried through and the use of the Ohio corporation prevent the transaction's being a *statutory* merger or consolidation. But this court pointed out in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, that the words "including the acquisition by one corporation of * * * substantially all the properties of another corporation" are not limited to acquisitions in the course of purely statutory mergers or consolidations. It is now settled that any such acquisition which is of the nature of a merger or consolidation falls within the definition in the Revenue Act. Clearly, if the Ohio corporation had never been formed, and if the stock of Indiana had been transferred directly to Glidden solely in return for Glidden stock, it would never have been contended that the transaction was not within the meaning of Section 112 (i) (1) (A). The existence of Ohio, then, as a separate corporation, is the only thing that can be thought to prevent the transaction from falling within this definition. But this court in the case of *Southern Pacific Co.* v. *Lowe*, 247 U. S., 330, laid down the rule that the separate corporate existences of a parent and a wholly owned subsidiary will be looked through if they are in fact and for all practical purposes merged into one unit, the subsidiary being but a part of the parent and subject in all things to the direction and control of the parent. The question in the *Southern Pacific* case was whether dividends received by the parent

from the subsidiary in 1914 were subject to the income tax of 1913. The facts showed that the dividends were paid out of a surplus that had accrued to the subsidiary prior to 1913. After pointing out the facts indicating the close relationship and identity of interest between the two corporations, this court said (pages 335-6):

> "* * * we deem it to be equally clear that this surplus accrued to the Southern Pacific Company prior to that date, in every substantial sense pertinent to the present inquiry, and hence underwent nothing more than a change of form when the dividends were declared."

This was true because the Central Pacific and the Southern Pacific were in substance identical because of the complete ownership and control which the latter possessed over the former as a stockholder and in other capacities.

The case of *Gulf Oil Corporation* v. *Lewellyn*, 248 U. S. 71, expanded the rule of the *Southern Pacific* case. In the *Gulf Oil* case the parent company was held not to be taxable upon dividends paid by its subsidiary out of funds acquired prior to the taxable year. The court said:

> "The petitioner did not itself do the business of its subsidiaries and have possession of their property as in *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330, but the principle of that case must be taken to cover this." (pp. 72-73).

It is true that the case of *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, has pointed out the limits to which this rule can be expanded:

> "*Southern Pacific Co.* v. *Lowe, supra*, and *Gulf Oil Corp.* v. *Lewellyn, supra* (the latter covered in principle by the first) cannot be regarded as laying down any general rule authorizing disregard of corporate entity in respect of taxation. These cases presented peculiar situations and were determined upon consideration of them. In the former this court said [p. 338]—'The case turns upon its very peculiar facts, and is distinguishable from others in which the question of the

identity of a controlling stockholder with his corporation has been raised. *Pullman Car Co.* v. *Missouri Pacific Ry. Co.*, 115 U. S. 587, 596; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, 391'." (p. 420.)

See also *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 441-2.

Of course, the true limitation of any rule must be recognized. But that fact does not weaken the force of its effect within the sphere where it does operate, and the lower federal courts have applied the doctrine of *Southern Pacific Co.* v. *Lowe* whenever they have felt that the facts presented in a particular case warranted it. Thus, in *North Jersey Title Insurance Co.* v. *Commissioner*, 84 F. (2d) 898, the Circuit Court of Appeals for the Third Circuit discussed the doctrine and said "the present case presents just such 'peculiar circumstances' ". The facts in this case were that the insurance company had invested $400,000.00 in mortgages on properties of two real estate companies which had been represented to be improved properties but turned out to be vacant lots. The fraud was discovered and in order to protect its interest, the insurance company forced the real estate companies into receivership. It was decided that in order to protect the business of the insurance company, it would be necessary to avoid it becoming publicly known that titles had been insured on buildings that never existed, and so a subsidiary was organized to take over the properties of the real estate companies and deal with them for the insurance company. Eventually the insurance company acquired all the stock of the subsidiary and treated it as a real estate department of its own organization. The Circuit Court of Appeals held that losses sustained by the subsidiary might be deducted from the income of the parent insurance company. There was no question of the right to file consolidated returns in this case, the case being argued

solely on the theory that the corporate identity of the subsidiary might be disregarded. The following appears at page 901 of the opinion:

> "The principle that substance and not form should control in the application of income tax law is fundamental. Fictional corporate camouflage cannot be made the device to escape taxation. On the other hand, equal equity demands that the creation of a subsidiary corporate structure with no purpose of evading tax but solely for the purpose of meeting the exigencies of a serious and possible fatal financial situation should not be regarded as the birth of a new entity completely unidentified with the former for taxing purposes, particularly under the peculiar circumstances surrounding the instant case."

It is apparent from the record in the case at bar that the creation of Ohio was not "fictional corporate camouflage * * * to escape taxation," because there would never have been any problem as to the taxability of Glidden stock had the transaction been carried out without the creation of Ohio.

This same proposition is set forth by the Circuit Court of Appeals for the Second Circuit in *Munson S. S. Line* v. *Commissioner*, 77 F. (2d) 849. That case involved the application of the Merchant Marine Act of 1920 which permitted deductions from the war profits and excess profits taxes of the Act of 1918 in the amount of the net earnings of certain vessels documented under the laws of the United States and operated in foreign trade, The owner of the vessels was the person entitled to the deduction. The taxpayer involved claimed a deduction for eight vessels, the title to which was in subsidiary wholly-owned corporations. The vessels were registered in the names of the subsidiaries and were operated by the parent under charters from its subsidiaries "through stock ownership and identity of officers and directors, the petitioner exercised complete do-

minion and control of the vessels, collecting the revenues and paying the expenses * * *." The Circuit Court of Appeals for the Second Circuit said at page 851:

> "The situation is similar to that involved in *Southern Pacific Co.* v. *Lowe* * * * where the court held that there was practical identity between the Central Pacific and the Southern Pacific because of the complete ownership and control which the latter corporation possessed over the former. Thus even in tax cases the separate identity of corporations may be disregarded in exceptional circumstances. See, also, *Gulf Oil Corp.* v. *Lewellyn* * * *; *New Colonial Ice Co.* v. *Helvering* * * *. In our opinion to disregard it under the circumstances here disclosed will better carry out the legislative purpose of the statute in question."

It was also said earlier in the opinion:

> "The petitioner's argument that the broad construction for which it contends is more consonant with the purpose of promoting the investment in new American ships seems to us well taken. No reason is apparent, or has been suggested, why Congress should wish to limit its encouragement to corporate shipowners whose vessels were held directly and to exclude corporations which operated through wholly-owned subsidiaries."

Nor is any reason apparent to us why Congress should intend to interfere with corporate reorganizations involving valid business transactions where the requisite continuity of interest exists, merely because a wholly owned subsidiary corporation is injected into the picture solely to suit the convenience of the parent corporation, and for no other purpose.

There is another line of Circuit Court of Appeals cases which involve the problem of disregarding the separate corporate identity of wholly controlled subsidiaries. These are the cases holding that in certain instances a receiver appointed for the property of a parent may administer the subsidiary companies' properties also. Such a case is *Com-*

merce Trust Co. v. *Woodbury,* 77 F. (2d) 478, 487 (C. C. A. 8, 1935) ("There are cases which hold that a receiver of the parent company, under the order of the court, may take over the property of the subsidiaries.") Also in *Trustees System Co. of Pennsylvania* v. *Payne,* 65 F. (2d) 103 (C. C. A. 3, 1933), it is said (p. 107):

> "Through long practice courts have not hesitated to disregard the doctrine of corporate entities when the facts justify it. Although we know of no instance in which it has been done in matters of receivership, we cannot see why the same power does not exist in a court or why the law does not impose upon a court the same duty in a receivership matter when, as here, the facts are substantial enough to justify, indeed to compel, a finding that the five corporations were so identified with the parent corporation as to be a part of it. Being of opinion that the law makes no exception of receiverships, we tear asunder the legal maze of corporate fiction in which they have enveloped themselves and, observing that the six corporations were not merely related by stock ownership but, like wheels in a machine, were so closely meshed that all functioned together, we find from the bills that in legal effect they were one * * *."

In the case of *Centmont Corporation* v. *Marsch,* 68 F. (2d) 460 (C. C. A. 1, 1933), involving the point of whether a parent is entitled to share in the assets of a subsidiary in receivership, the court held that because of the control exercised by the parent over the subsidiary, the separate corporate entity must be disregarded.

To return to cases involving taxation, the case of *H. H. Miller Industries Co.* v. *Commissioner,* 61 F. (2d) 412 (C. C. A. 6, 1932), is helpful. That case involved the question of whether the deduction for exhaustion of a patent should be allowed a successor corporation as of the value on March 1, 1913, prior to which time the original corporation had acquired the patent, or upon the cost to the successor in 1918, at which time the successor company took over the assets

of the original corporation. The Board of Tax Appeals held that the basis for computing exhaustion was not March 1, 1913 value but the cost to the successor company at the date of organization and transfer of assets, upon the sole ground that the two corporations were technically separate and distinct taxable entities. The Circuit Court of Appeals reversed this decision, saying:

> "A taxing statute must be construed with regard to substance rather than to form. * * * Corporate entities are disregarded for tax purposes where subsidiary corporations are wholly owned by parent companies. *Southern Pacific Company* v. *Lowe*, * * *; *Gulf Oil Corporation* v. *Lewellyn* * * *. Where reorganization involves no change in capital structure, the new corporation is considered substantially a continuation of the old. *Weiss* v. *Stearn*, 265 U. S. 242 * * *."

and again at page 414:

> "We have here substantial identity of two corporations, with the same capital structure, same officers, and the same assets. Under these circumstances, to hold that they are two distinct taxable entities would be wholly to disregard substance and to emphasize mere form. Courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate entity did not exist, and as the justice of the case may require."

Equally applicable is the statement which is made in *Osburn California Corp.* v. *Welch*, 39 F. (2d) 41 at 43:

> "The notion that a corporation is an entity separate and distinct from its stockholders is a fiction of law which the court will regard for some purposes and disregard for others. For tax purposes, this fiction is often disregarded."

An analysis of the facts in this case indicate that the peculiar circumstances are present which make this doctrine applicable. It is obvious that Ohio was organized by Glidden to carry on a new branch of its business that it was acquiring. Under the terms of the contract, Glidden

agreed to incorporate this subsidiary, Ohio, and had the sole power of determining its capitalization. Glidden was authorized by the contract to select the auditors who should determine the book value of the Indiana assets to be acquired. Glidden agreed to guarantee the payment of certain dividends on the Ohio stock to be issued to the Indiana stockholders. Glidden agreed to furnish all the cash to be paid by Ohio to Indiana stockholders.

It is stipulated that Glidden carried out all these agreements. In addition, it appears from the record (page 4) that Glidden paid the regular quarterly dividends upon the preferred stock of Ohio.

The foregoing shows that up to the time the stock in Indiana was acquired, Ohio was an empty shell with no assets except that it received from Glidden for 100 shares of its common stock a sum in cash which it, in turn, was to pay to the Indiana stockholders at Glidden's direction. Ohio was simply a receptacle formed by Glidden to receive the Indiana stock, and eventually the Indiana assets. Even after the stock of Indiana was transferred to Ohio, the stipulation of facts shows the extent of the control of Ohio by Glidden (R. 13):

> "Glidden and Company * * * caused the properties and assets of the Indiana Company to be conveyed and transferred to the new Ohio Company".

It is apparent that Ohio was simply an instrumentality used by Glidden to carry out this contract with the Indiana stockholders in order to acquire Indiana's assets for use in connection with its business. This control of a subsidiary so that it may be used as mere agency or instrumentality of a parent company is discussed in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic Association,* 247 U. S. 490, where at pages 500-501, it is pointed out that although mere ownership alone of capital stock of one

corporation by another does not create an identity of corporate interest, still

> "* * * where stock ownership has been resorted to not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies."

the separate entities of the corporations would be disregarded. The court further said:

> "In such a case the courts will not permit themselves to be blinded or deceived by mere forms or law, but, regardless of fictions, will deal with the substance of the transaction involved as if corporate agency did not exist and as the justice of the case may require"

citing *United States* v. *Lehigh Valley Coal Co.*, 220 U. S. 247, 253, and *United States* v. *Delaware, Lackawanna and Western R. R. Co.*, 238 U. S. 516.

The parties to the transaction have thus themselves disregarded the separate corporate entity of one of the parties involved, not with any view to evading the tax burden, but entirely for their own convenience as a matter of business exigency. The courts should do likewise, since, as has often been said, taxation is a matter of substance and not form. *Weiss* v. *Stearn*, 265 U. S. 242 at 254.

Although not expressed in exactly these words, this court disregarded the corporate entity of the subsidiary corporation in the case of *Gregory* v. *Helvering*, 293 U. S. 465, where it was said (p. 469):

> "No doubt, a new and valid corporation was created. But that corporation was nothing more than a contrivance to the end last described. It was brought into existence for no other purpose; it performed, as it was intended from the beginning it should perform, no other function."

Even so, Ohio was created as a mere instrumentality for carrying out the purposes of Glidden, and as this court dis-

regarded the separate entity of the subsidiary in the *Gregory* case, so may the separate corporate entity of Ohio be disregarded in this case.

But the result of "piercing the corporate veil" in the two cases is entirely different. For in the *Gregory* case, if the formation of the subsidiary corporation is disregarded, the transaction clearly resulted in taxable gain, while if the formation of Ohio is disregarded in the instant case, there is admittedly no recognition of gain on receipt of the Glidden stock. And clearly the transfer in this case was made "in pursuance of a plan of reorganization" within the meaning of the Revenue Act.

Thus, in substance, Glidden acquired all the stock of Indiana and in essence performed the specific act constituting a reorganization of Indiana as described and defined in Section 112 (i) (1) (A). Applying even the narrowest test yet suggested, Glidden is then included under Section 112 (i) (2) by the language " 'a party to a reorganization' * * * includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation", since Glidden, through its instrumentality and *alter ego*, Ohio, acquired all the stock of Indiana.

Conclusion.

It is accordingly respectfully submitted:

1. That this case is one proper for the exercise by this court of its power of review by certiorari.

2. That the conflicts in decisions of the Circuit Courts of Appeals, the desirability of authoritative construction of the federal statute involved, and the inconsistency of the decision of the United States Circuit Court of Appeals for

the Seventh Circuit in this case with applicable decisions of this court, warrant the exercise by this court of its supervisory powers.

3. That the decision of the United States Circuit Court of Appeals for the Seventh Circuit is erroneous.

4. That for the reasons stated this court should review the decision of the United States Circuit Court of Appeals for the Seventh Circuit and upon hearing reverse it.

EGBERT ROBERTSON,
JAMES C. SPENCE,
Counsel for Petitioner.

DAVID L. KREBS,
HENRY L. MCINTYRE,
Of Counsel.

APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OF LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(c) *Gain from exchanges not solely in kind.*—(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if imme-

diately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937

No. 21

HERMAN C. GROMAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER

EGBERT ROBERTSON,
JAMES C. SPENCE,
Counsel for Petitioner.

DAVID L. KREBS,
HENRY L. MCINTYRE,
Of Counsel.

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INDEX

PAGE

Caption 1

Summary of Supplemental Argument 2

Supplemental Argument:

Point I 3

Point II 11

Point III 14

Conclusion 17

CITATIONS

Cases:

Burnett v. Houston, 283 U. S. 223 3

Bus and Transport Securities Corp. v. Helvering, 79 F. (2d) 509 9

Bus and Transport Securities Corp. v. Helvering, 296 U. S. 391 ..... 8, 10, 11

Helvering v. Minnesota Tea Co., 89 F. (2d) 711 4

Helvering v. Minnesota Tea Co., 296 U. S. 378 ..... 5, 10, 14

New Colonial Co. v. Helvering, 292 U. S. 435 3

Pinellas Ice Co. v. Commissioner, 287 U. S. 462 10

Union Trust Co. v. Heiner, 18 F. Supp. 801 ..... 13, 16

Statutes:

Revenue Act of 1928, Section 112 (b) (3) 2, 4, 5

Section 112 (i) (1) 2, 4, 5, 6, 7, 8, 15, 16

Section 112 (i) (2) 4, 6, 7

Section 112 (j) 15

Regulations:

Reg. 74, Art. 577 6

Commissioner's Brief in Helvering v. Bashford, No. 33 October Term, 1937 ..... 1, 3, 11, 12, 14, 15

Commissioner's Petition for Certiorari in Helvering v. Bashford, No. 33 October Term, 1937 13

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With our petition for writ of certiorari in this case we filed a complete brief on the merits (including the prescribed statements as to the opinions below, jurisdiction, specification of errors, etc.), and had intended to stand thereon, since the time for the filing of a brief for respondent would not allow for the filing of a reply within the time allotted us.

However, the Commissioner's brief has now been filed in the case of *Helvering* v. *Bashford,* (No. 33, October Term, 1937), and in view of the similarity of the two

cases we anticipate that the position taken by the Commissioner in our case will be substantially the same as he has asserted in the *Bashford* case. This gives us the opportunity of discussing here what we assume will be the Commissioner's contentions, which we shall attempt to do without reiteration of the argument contained in our original brief.

Summary of Supplemental Argument.

POINT I. The provisions of the reorganization sections do not create a statutory exemption, but are in their nature administrative, and merely postpone the imposition of the tax until the time when income is actually realized. The position taken by the Commissioner, that a corporation may not be a party to a reorganization within the meaning of Section 112(b)(3) unless it itself has performed some of the acts specified in Section 112(i)(1), is without support in any statutory language or any authoritative judicial interpretation, and is not sound in reason. Whether the acts described in Section 112(i)(1) have occurred is a circumstance which determines whether there has been a reorganization. When it is determined that a reorganization has occurred, then the question whether a corporation is a party thereto is to be determined by its participation, and whether its exchanged securities represent a continuing definite substantial interest in the earning power of the transferred assets.

POINT II. In the instant case Glidden was a party to the reorganization even within the unwarrantedly restricted interpretation for which the Commissioner contends, since it did in fact perform part of the acts by which all the stock of Indiana was acquired by Ohio, namely, the issuance and delivery to Indiana stockholders of Glidden's prior preference stock, and the guaranty

by Glidden of dividends upon and redemption of the preferred stock of Ohio.

POINT III. In the instant case Glidden, through its instrumentality and *alter ego,* Ohio, whose corporate entity should be disregarded, did itself acquire all the stock of Indiana. The statutory definition of "control" has no application to the question of disregarding the corporate entity.

Supplemental Argument.

POINT I.

THERE IS NO SUPPORT FOR THE COMMISSIONER'S POSITION THAT THE ONLY PARTIES TO A REORGANIZATION ARE THOSE PERFORMING THE ACTS SPECIFIED IN SECTION 112(i)(1).

Throughout the discussion of this question in the brief of the Commissioner in the *Bashford* case, it seems to be assumed that the provisions of the reorganization sections of the taxing acts constitute an *exemption* from taxation of the taxpayer so affected. At page 12 of the brief the words "statutory exemptions" are specifically used. The principle of strict construction contended for is applicable where exemptions from taxation or deductions from income are sought to be availed of by the taxpayer, and both cases cited in the Commissioner's brief (*Burnet* v. *Houston,* 283 U. S. 223; *New Colonial Company* v. *Helvering,* 292 U. S. 435) are of this character.

But the provisions of the reorganization sections are not within this category. They do not grant exemptions nor do they relieve the transactions there involved of the burden of taxation, nor create deductions from income. Their primary purpose is administrative; they furnish a criterion for determining when income shall be treated as realized, and postpone the incidence of the tax until

that date when the gain is, in fact, realized. This question is specifically discussed in the decision of the Circuit Court of Appeals for the 8th Circuit in *Helvering* v. *Minnesota Tea Company,* 89 F. (2d) 711, after the remandment of that case by this court. In that opinion the court said:

> "The provisions [of the reorganization sections] that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended, but operate only as a postponement of the tax until gain is clearly realized by a future sale or exchange amounting thereto."

The brief filed for the Commissioner in the *Bashford* case, while conceding that the language of Section 112 (i) (2) with respect to a party to a reorganization is not all-inclusive, exhibits all through the brief, it seems to us, a confusion of thought in referring to this language as a "definition." (Pages 15, 17, 21.) This question is fully argued in our original brief at pages 14 to 20, and we believe it is demonstrable, and there demonstrated, that this section does not attempt to "define" a party to a reorganization, but only to "enumerate certain cases with respect to which doubt might arise."

The Commissioner's fundamental position seems to be that a corporation cannot be "a party to a reorganization" within the language of Section 112(b) (3) unless it itself performs one of the specific acts defined in Section 112(i) (1), and we believe this to be a basic misconception, unwarranted by anything in the statute or any supporting interpretation of it. And the Commissioner's brief does not seem to us to state any reason why this should be the construction, but merely to assert that the statute should be so construed.

As we view it, Section 112(i) (1) must be complied with by some one or more corporations in order that

there may be a reorganization. When there has been a merger or consolidation (including the enlargement of those terms by the parenthetical clause of the section, as interpreted by this court in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, at 385), then no other recourse need be had to Section 112(i) (1), and the question of what corporations were parties to the reorganization is a new and different question. We have attacked this *a priori* and upon authority in our original brief at pages 20 to 24, but in view of the position taken in the Commissioner's brief in the *Bashford* case it seems appropriate to add some further suggestions.

If Congress had intended that "a party to a reorganization" should mean only those corporations which perform the specific acts specified in Section 112(i) (1), we think Section 112(b) (3) would have been cast in an entirely different mold. Had the language of that section been:

> "No gain shall be recognized if stock or securities in either of the corporations between whom there is carried out a reorganization, as provided in Section 112(i) (1), are in pursuance of the plan of reorganization exchanged solely for stock or securities in such corporation or the other corporation"

we think this would have evidenced a Congressional intent to limit the application of Section 112(b) (3) to the particular corporations performing the acts described in Section 112(i) (1). But the language actually used by Congress refers to the exchange of stock or securities in a corporation "a party to a reorganization" for stock or securities "in such corporation or *in another corporation a party to the reorganization.*" This language, both by the omission of any reference to Section 112(i) (1) and in the use of the indefinite article plus the expression "another corporation" (rather than "the other corporation") makes it clear that Congress con-

templated parties other than the immediate transferor and transferee corporations.

Section 577 of Regulations 74 under the Revenue Act of 1928, as we pointed out on page 17 of our original brief, speaking of Section 112(i)(2), says:

> "This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which *doubt might arise.*"

If the government's contention that the only parties to a reorganization are those corporations performing the specific acts enumerated in Section 112(i)(1) is correct, there cannot possibly be any doubt as to the fact that "both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation" are parties to a reorganization, and there would be no reason for the specific enumeration of these corporations in Section 112(i)(2). It is indisputable that there is no more doubt as to the status of these corporations, under the theory of the Commissioner, than there is in the case of the acquisition by one corporation of substantially all the properties of another corporation. Yet there is no specific mention of the latter situation in Section 112(i)(2). It is not reasonable that Congress, when its sole purpose is to remove doubt, would mention one category and omit to mention another when both categories are equally free from doubt, or equally dubious.

Similarly, there would be no doubt as to the status of "a corporation resulting from a reorganization" if the bare performance of the acts set forth in Section 112(i)(1) is the sole test of whether a corporation is a party to a reorganization, for always the corporation which results from a reorganization has acquired either the

requisite amount of stock or property of another corporation or corporations.

Under what theory, then, does it appear that the two instances specified in Section 112(i) (2) give rise to more doubt than other cases? We submit that the test of corporate participation explains the language of Section 112(i) (2). Analyzed from the viewpoint of determining whether the necessary corporate participation is present, the two situations covered by Section 112(i) (2) at once stand out as raising the closest question. A corporation resulting from a reorganization, not being in existence at the time the reorganization was conceived of and entered into, might otherwise have been thought not to be "a party to a reorganization," since it actually came into existence after the conception of the reorganization, and is the outcome thereof.

The other transaction described in Section 112(i) (2) also concerns a case wherein there is no corporate action on the part of one of the corporations concerned, because where the B corporation, for example, acquires a majority of the voting stock and a majority of all other classes of stock of the A corporation, this may be done directly by the B corporation from the stockholders of the A corporation, without any action by the A corporation itself. It might be thought that after such a transaction the A corporation, never having acted in its corporate capacity in this matter, would not be "a party to a reorganization." Thus interpreted the presence of Section 112(i) (2) strengthens our contention that *participation* is an essential factor in the Congressional conception of "a party to a reorganization," and that Congress was not thinking solely in terms of the acts required in Section 112(i) (1).

The foregoing suggestions we believe sustain our claim that there is no statutory language appropriate to

support the contention of the Commissioner that in order to be a party to a reorganization a corporation must itself have performed the acts specified in Section 112 (i) (1). Is there any authoritative opinion from which such a rule may be deduced?

In our view the case of *Bus and Transport Corp.* v. *Helvering,* 296 U. S. 391, which apparently the Commissioner in the *Bashford* brief regards as the most nearly controlling opinion, does not even tend to support his position. While the opinion of this court sustains the conclusion of the lower court that the petitioner in that case "was not a party to a reorganization," the actual question decided was not who were parties to a reorganization, but whether there was any reorganization at all. The language of the opinion is positive and specific on this point in the statement: "nothing here, we think, even remotely resembles either merger or reorganization as commonly understood."

The exchange of securities in that case took place between Public Service Coordinated Transport Company and the Bus and Transport Securities Corporation. Public Service Coordinated Transport Company owned all the stock of C. Easman Jacobus, Inc., which in turn owned twenty-five hundred shares of Public Service Company stock. The C. Easman Jacobus, Inc. stock went to Bus and Transport Securities Corporation, which owned some shares of bus lines stock and gave them in exchange to Public Service Coordinated Transport Company. At the conclusion of the transaction Jacobus (an individual) owned the Bus and Transport Securities Corporation; that company owned all the stock of C. Easman Jacobus, Inc., which had as its sole asset twenty-five hundred shares of Public Service Company stock; Public Service Company had some undisclosed affiliation with Public Service Coordinated Transport Company, and Public

Service Coordinated Transport Company owned the stock of the bus lines which had originally belonged to Jacobus.

In considering this decision it is manifest at once that the whole arrangement was an obvious scheme to evade taxation, and not a *bona fide* business transaction. This is fully set forth in the opinion of the Circuit Court of Appeals for the Third Circuit, reported at 79 F. (2d), 509 and 510, and affirmed by the decision of this court. The opinion of this court made short work of the question, and the holding is that there was no reorganization at all. Since there was no reorganization there was no occasion to consider who might have been parties to a reorganization which was non-existent.

We think the only applicability of this decision lies in what might be considered an extension of the requirements with respect to a continuity of interest in transferred assets. Numerous decisions referred to in our original brief in this case at pages 22 to 24 indicate as an essential criterion in determining "partyship" to a reorganization the necessity that the stockholders whose stock is exchanged shall receive in exchange therefor something which evidences a continuing interest in the earning power of the same assets in which the stockholders originally had an interest by virtue of their stock ownership. The conception underlying this is primarily economic, and goes to the fundamental question of whether there has been in fact a *realization* from the sale or exchange of the stock. Where the exchanging stockholders receive in the exchange securities which render them in effect continuing partners in the enterprise in which they were originally interested, they have not in reality as to such new securities changed their fundamental relationship to those assets, but retain their interest in the earning power thereof. In interpreting the

words "party to a reorganization" this court and the Circuit Courts of Appeal have in several cases applied this basic test. This court in the *Pinellas* case, (*Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462), declared that "the interest in the affairs of the purchasing company must be more definite than that incident to the ownership of its short-term purchase money notes"; and in *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, this court added the statement that such interest must be "definite and material" and "must represent a substantial part of the value of the thing transferred"; and then in the *Minnesota Tea Company* opinion this court expresses in a sentence the basic philosophy of this requirement, in the statement: "This much is necessary in order that the result accomplished *may genuinely partake of the nature of merger or consolidation.*"

In the *Bus and Transport Securities Corporation* case this court stated that neither party to the exchange acquired any "definite *immediate* interest in the other." Apparently it is from the use of the word "immediate" that counsel for the Commissioner in the *Bashford* case argue that the retained interest in the affairs of the purchasing corporation must be direct and not through any intermediate stockholding. This court did not say so in the *Bus and Transport Securities Corporation* case, and we do not believe that a fair construction of the language indicates that the word "immediate" was used in any such sense. If this were so the beneficiaries of a distributable income trust which held stock involved in a corporate reorganization would at once be taxable upon transactions plainly within the purview of the statute and as to which all other stockholders holding stock in their own names would not be taxable. When this court undertook deliberately in the *Minnesota Tea* case to define the character of retained interest which would satisfy the re-

quirement of continuity of interest, it did not use the word "immediate" or any equivalent, and it seems to us that this attempted argument from the *Bus and Transport Securities Corporation* case is seizing upon a straw and attempting to pervert the real meaning of that decision, which did not concern itself at all with the question here under consideration. Had this court intended to declare that any intervening "holdership" would prevent the existence of a "definite" and "continuing" and "substantial" interest in the affairs of the purchasing company, it would, we think, have said so in unequivocal terms; and the distortion of this single word in the *Bus and Transport Securities Corporation* opinion evidences to our mind the weakness of the Commissioner's position on the substantial question here to be decided.

POINT II.

GLIDDEN WAS A PARTY TO THE REORGANIZATION EVEN UNDER THE COMMISSIONER'S INTERPRETATION.

The Commissioner, at page 13 of his brief in the *Bashford* case, says:

> "But Atlas was not a party to these exchanges between the old companies and the new company which did constitute a reorganization and acquired neither the assets nor any of the stock of the old companies."

This statement indicates that the Commissioner cannot conceive of a corporation being a party to an exchange of assets, unless it acquires some of the assets or stock which are being exchanged. We suggest that a corporation which furnishes part or all of the consideration for the stock or assets exchanged is as much a party to the exchange as the corporation which receives the assets. Where a father contracts with a university for his son's

education, is not the father a party to the exchange transaction even although not the recipient of the instruction? The stipulation of facts in our case shows that Glidden furnished a substantial part of the consideration for the surrender of the Indiana stock by its stockholders. It issued $553,980.00 of its own prior preference stock directly to the Indiana shareholders and guaranteed quarterly dividends upon the Ohio stock and its ultimate redemption. It is clear that Glidden was an essential party to this three-cornered transaction and there could have been no exchange between the three corporations without the stock and other considerations moving from Glidden.

On page 19 of the brief in the *Bashford* case, the Commissioner says:

> "The agreement pursuant to which Peerless assets and stock were transferred gave no rights to Atlas and imposed no duties on it save guaranteeing the performance by the new company of some of its obligations."

Whether this statement is correct or not as applied to Atlas it is readily apparent from the stipulation of facts in our case that Glidden was given many rights and undertook many duties by the terms of its contract with the stockholders of Indiana. Among the rights given Glidden was that of determining the capitalization of Ohio, acquiring all the common stock of Ohio, and selecting the auditors to value the assets of the Indiana corporation; in return, Glidden undertook the duty of organizing and incorporating the Ohio company and of issuing and delivering its own securities and causing the issuance and delivery of the Ohio securities, and ultimately of causing the assets of Indiana to be transferred to Ohio. It also guaranteed the dividends on and ultimate redemption of the Ohio preferred stock, as above set forth.

The Commissioner in his petition for a writ of certiorari in *Helvering* v. *Bashford*, recognized the importance of Glidden in this case and on page 12 of his brief said:

> "In that case [Groman] as in the instant case, the corporation which motivated the entire reorganization scheme furnished the necessary cash and stock to carry out the reorganization and after the consummation of the plan was in control of the new company."

Hence, if the creation of rights and duties under the reorganization agreement be determinative of the status of the particular corporation, Glidden clearly satisfies this test.

At page 21 of the Commissioner's brief, the case of *Union Trust Company* v. *Heiner*, 18 F. Supp. 801 is cited with the comment:

> "The court there held that the parent was not a party to a reorganization in which the assets were transferred to a subsidiary."

This is another example of the emphasis which the Commissioner places upon the entity to which the assets are transferred. The facts of the *Union Trust Company* case are that the General American Tank Car Corporation, which was a going concern organized under the laws of West Virginia, acquired all the assets of the Federal Tank Line by giving in exchange common stock of the General American Tank Car Corporation of New York, which owned control of the West Virginia corporation. The issue in the case, as interpreted by the District Court, was whether there was a reorganization so that the stock of the New York corporation was received without recognition of gain. The court said:

> "Had the West Virginia corporation given its own stock for the property of the Pennsylvania corpora-

> tion, there would have been a reorganization under the authority of *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378 * * *, but as the West Virginia corporation gave not its own stock but that of the New York corporation, there was no reorganization, even though the New York corporation controlled the West Virginia corporation. *Bus and Transport Securities Corporation* v. *Helvering,* 296 U. S. 391. * * *"

In analyzing this case it is first apparent that the transferor acquired no stock in the transferee, so that under the rule of the *Minnesota Tea Company* case, 296 U. S. 378, there was no reorganization. However, even had the West Virginia corporation transferred part of its own stock to Federal Tank Line in addition to stock of the New York corporation so that there would have been a reorganization, still the New York corporation would not be a party to the reorganization, because its stock was furnished not by it but by the West Virginia corporation. Furthermore, so far as the opinion shows, the New York corporation did not in any way participate in the transaction with Federal Tank Line.

We agree with the statement several times repeated in the Commissioner's brief in the *Bashford* case that "one corporation is not a party to a reorganization * * * merely because another corporation, which it controls, is a party." We have never contended that the mere relationship of parent and subsidiary in and of itself is sufficient to satisfy the statute. Rather, as pointed out in our original brief, the two *criteria* of participation and continuity of interest must both be satisfied.

POINT III.

THE CORPORATE ENTITY OF OHIO MAY BE DISREGARDED.

This question was fully argued and the applicable authorities discussed at pages 28 to 38 of our original brief.

In the brief filed by the Commissioner in the *Bashford* case there is little discussion of the point but the position is taken that the court should adhere strictly to what is concededly the general rule, that a corporation is an entity distinct from its stockholders. In the *Bashford* brief the Commissioner says:

> "The necessity of maintaining the identity of parent and subsidiary is doubly apparent in the case of the reorganization provisions of the statute, where the degrees and types of corporate control and reorganization are defined with meticulous precision."

With due respect to the author of the brief, this seems to us a complete *non sequitur* as well as an incorrect statement of the fact with respect to the taxing statutes.

It is perfectly obvious that "control" is defined in Section 112(j) solely to explain the meaning of that word as used in Section 112(i)(1)(B) in determining whether the fact of reorganization exists in a particular situation. There is no justification for assuming that Congress intended this definition to be used for any other purpose. The very act of defining the "control" of one corporation by another presupposes a separation of the corporate identities.

As used in those cases in which the question of disregarding corporate entity is involved "control" is a question of fact.

In our case it is apparent that Glidden contracted to create and did create Ohio; that it issued its own stock to the stockholders of Indiana as part of the consideration by which the Indiana stock was transferred to Ohio; and that it operated Ohio as a department of the business of Glidden. The preferred stock of Ohio which was not held by Glidden was non-voting, so that the entire

actual control of Ohio was in Glidden. The preferred stock was subject to redemption at any time; and Glidden guaranteed that it should be redeemed. (R. 12) For all practical purposes, therefore, Glidden's control of Ohio was absolute. It is apparent that Ohio was a mere instrumentality of Glidden, and the situation is squarely within the decisions cited on this question in our original brief.

While the statutory definition of "control," as above pointed out, seems to us completely irrelevant to a discussion of whether the corporate entity of Ohio should be disregarded, we might point out that if it is thought to have any application to this question Glidden and its stockholders, both before and after the exchange of securities involved herein, were in 100% control of Ohio. Prior to the transfer of Indiana's stock to Ohio, Ohio had only one stockholder, Glidden, which owned its entire outstanding common stock, which was all the stock then issued. After the transfer of Indiana's stock to Ohio, Ohio's stockholders consisted of Glidden, still owning the entire common stock, and Glidden's stockholders, owning the entire preferred stock of Ohio; so that the situation then was squarely within the language of Clause (B) of Section 112(i)(1). We think, however, that this is rather beside the question, and suggest it only because of what seems to us a confusion in the Commissioner's brief in the *Bashford* case upon this question.

In the same section of the Commissioner's brief in the *Bashford* case is cited the case of *Union Trust Co.* v. *Heiner,* 18 Fed. Sup. 801, a decision of the District Court for the Western District of Pennsylvania. We do not think that this case (even if it were authoritative in this forum) is of any assistance in determining what circumstances are necessary to warrant disregarding the cor-

porate entity of a subsidiary corporation, because the question was not discussed and none of the facts are set forth in the opinion.

CONCLUSION.

For the foregoing reasons and those stated in our original brief on the subject we submit that the Glidden Company was a party to the reorganization which concededly occurred here; that its stock, issued by it to the stockholders of Indiana in exchange for their stock in Indiana, constituted stock in a corporation which was a party to a reorganization; that the exchange was in pursuance of the plan of reorganization; that such stock was received without recognition of gain or loss; and that the decision of the Circuit Court of Appeals for the Seventh Circuit holding otherwise should be reversed.

EGBERT ROBERTSON,
JAMES C. SPENCE,
Counsel for Petitioner.

DAVID L. KREBS,
HENRY L. MCINTYRE,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 854

HERMAN C. GROMAN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

The stipulated facts show that the Glidden Company contracted with all the stockholders of the Metals Refining Company, a competing Indiana company, to organize a new Ohio company. These companies will be referred to as Glidden, Indiana, and Ohio, respectively. Indiana's stockholders, of whom petitioner is one, were to transfer to Ohio all their stock in Indiana, and were to receive in exchange 5,276 shares of prior preference stock of

Glidden, 5,000 shares of preferred stock of Ohio, and an amount of cash to be computed according to provisions of the contract. Glidden received all of the common stock of Ohio. (R. 11–14, 43–44.)

It is conceded that the cash received by Indiana's stockholders is taxable to the extent of the gain included therein and that the preferred stock of Ohio was received without recognition of gain or loss. The sole question here presented is whether Glidden stock was received without recognition of gain or loss by reason of the provisions of Section 112 (b) (3) of the Revenue Act of 1928, c. 852, 45 Stat. 791.

The court below reversed the Board of Tax Appeals and held that the transaction in question did not fall within the statutory exemption, expressing the opinion that it saw no reason for extending the meaning of the term "party to a reorganization" as defined by Congress, since the fundamental reason for exempting the receipt of stock of the new or "acquiring" company—which reason is, though not expressed by the court, the continuity of interest through the modified corporate form—does not require the exemption of the stock of a third company. We submit that the court below applied the proper principles and reached a correct result. Cf. *Bus & Trans. Corp.* v. *Helvering,* 296 U. S. 391.

However, in view of the contrary construction of the same statutory provisions adopted in *Com-*

missioner v. *Bashford*, 87 F. (2d) 827 (C. C. A. 3d), involving an almost identical transaction, we are not warranted in opposing the petition.

The Government has filed petition for a writ of certiorari in the *Bashford* case, No. 916, October Term, 1936.

Respectfully submitted.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Summary of argument	6
Argument:	
Glidden was not a party to the statutory reorganization effected between the old company, Indiana, and the new company, Ohio	7
Conclusion	13
Appendix	14

CITATIONS

Cases:	
Bus & Trans. Corp. v. *Helvering*, 296 U. S. 391	10, 12
Fifth Avenue Bank of New York v. *Commissioner*, 31 B. T. A. 945, affirmed, 84 F. (2d) 787	5
Helvering v. *Raymond I. Bashford*, No. 33, present Term	5, 6, 8, 11, 13
Helvering v. *Minnesota Tea Co.*, 296 U. S. 378	10
Pinellas Ice Co. v. *Commissioner*, 287 U. S. 462	10
Statute:	
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 112	14
Miscellaneous:	
Treasury Regulations 74, Art. 577	16

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 21

HERMAN C. GROMAN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 10–18) is unreported. The opinion of the Circuit Court of Appeals (R. 43–47) is reported in 86 F. (2d) 670.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 30, 1936 (R. 47), and a petition for rehearing was denied January 7, 1937 (R. 48). The petition for writ of certiorari was filed April 5, 1937, and was granted May 24, 1937 (R.

49). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer owned stock in A corporation, which transferred its assets to B corporation in a statutory reorganization. Taxpayer exchanged his stock in A corporation for stock in B corporation, cash, and stock in C corporation. C corporation is the parent of B and the instigator of the reorganization plan. The question is whether the gain represented by the C stock is taxable. This depends upon whether the C stock is stock of a corporation a party to the reorganization, under Section 112 (b) (3), or "other property" under Section 112 (c) (1), Revenue Act of 1928.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 14–18.

STATEMENT

The facts in this case were found by the Board of Tax Appeals pursuant to a stipulation of the parties (R. 11–14), and may be summarized as follows:

Prior to January 29, 1929, the petitioner and others were stockholders in Metals Refining Company, located in and incorporated under the laws of Indiana. Metals Refining Company, herein

called Indiana, had an authorized capital stock of $500,000 consisting of 5,000 shares of a par value of $100 each, of which 4,421 shares were issued and outstanding on January 29, 1929. Indiana was engaged in the business of refining lead and in the production of various alloys. The Glidden Company, herein called Glidden, is and was on January 29, 1929, a corporation organized and existing under the laws of Ohio, engaged principally in the manufacture of paints and varnishes (R. 11).

Under date of January 29, 1929 an agreement was executed between Glidden and the holders of all of the outstanding stock of Indiana, the premises of which set out (R. 11) that the stockholders of Indiana desired to merge or consolidate Indiana's property with Glidden and with a new corporation to be organized under Ohio laws as provided in the agreement. The stockholders agreed to sell their Indiana shares to a corporation to be organized under Ohio laws by Glidden, the new corporation to have 5,000 preferred shares of a par value of $100 each and to have such number of common shares as Glidden should determine. All the common shares were to be acquired by Glidden for a cash consideration. Glidden agreed to organize a new corporation, which would have the authority to carry on Indiana's business and agreed that on the transfer of the Indiana stock to it by the holders thereof it would cause its (Glidden's) assets to be conveyed to the new company.

Glidden further agreed that as a consideration for the consolidation it would issue and deliver shares of its own stock and of the new company to Indiana's stockholders and would make those stockholders a cash payment in an agreed amount (R. 12–13).

Pursuant to this contract Glidden caused to be organized under the laws of Ohio a corporation named Metals Refining Company of Ohio, herein called Ohio, which had preferred and common stock. Then followed the transfer to Ohio by the petitioner and the other stockholders of Indiana of their stock in Indiana, soon after which Glidden, which was, under the agreement, the owner of the common stock of Ohio but which did not receive any of its preferred stock, caused the properties and assets of Indiana to be conveyed and transferred to the new company, Ohio. Indiana was thereafter dissolved (R. 13).

Further carrying out the agreement, each stockholder of Indiana, including the petitioner, received a proportionate amount of the cash payment as computed in the agreement, of Ohio stock, and of Glidden stock (R. 14). The Commissioner of Internal Revenue determined that Glidden was not a party to the reorganization which he conceded to have been effected between Indiana and the new company, Ohio. Consequently, he treated as taxable income not only the cash received by the petitioner in the exchange but also the fair market

value of the preferred stock of Glidden which the petitioner had received (R. 14).

The Board of Tax Appeals reversed the determination of the Commissioner upon the authority of its own earlier decision in *Fifth Avenue Bank of New York* v. *Commissioner,* 31 B. T. A. 945, affirmed by the Circuit Court of Appeals for the Third Circuit, 84 F. (2d) 787, in which it was held that a parent corporation similarly situated to Glidden "was so intimately connected with the several transactions which resulted in the statutory reorganization that in our opinion it must be held to be a party to the reorganization within the statutory sense of the term" (R. 17). Accordingly, the Board held that the stock of Glidden as well as that of Ohio was received by the petitioner without recognition of gain.

The Circuit Court of Appeals for the Seventh Circuit reversed the decision of the Board and held the Board's construction of the statute to be an unwarranted extension of the term "a party to a reorganization" under Section 112 (i) (2), of the Revenue Act of 1928 *infra,* p. 16.

The petitioner filed a writ of certiorari in this Court, No. 854, October Term, 1936, and the respondent did not oppose because of a contrary construction of the same statutory provision which had been adopted by the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Bashford* 87 F. (2d) 827, which involved an al-

most identical transaction, and which is now pending before this Court, No. 33, October Term, 1937. This Court granted the writ.

SUMMARY OF ARGUMENT

There was a reorganization between Indiana and the new company, Ohio. But Glidden was not reorganized and was not a party to the reorganization either within the literal terms of the statutory definition or within its purpose.

The definition of "a party to a reorganization" is found in Section 112 (i) (2). This provision follows the definition of "reorganization" found in Section 112 (i) (1) and plainly must be read in connection with the definition of reorganization. The fundamental principle laid down by this Court in the construction and application of reorganization provisions is that for a party to an exchange to come within the exemption provisions he or it must acquire an immediate, definite and material interest in the assets and affairs of the other party. Plainly, stock in another corporation does not provide a definite and direct interest in the transferred assets, even though the second corporation may own stock in the transferee.

We have argued fully in the brief for the petitioner in *Helvering* v. *Bashford,* No. 33, October Term, 1937, that (1) Atlas in that case was not a party to the reorganization within the literal terms of the statutory definition and (2) Atlas was not a

party to the statutory reorganization because it conceived and executed a general plan which included such a reorganization. As the facts of the two cases are very similar and as Glidden in this case stands in the same position as Atlas in that case, those arguments are equally applicable to the facts of this case and accordingly the arguments of the *Bashford* case are incorporated herein by reference and are made a part hereof.

ARGUMENT

GLIDDEN WAS NOT A PARTY TO THE STATUTORY REORGANIZATION EFFECTED BETWEEN THE OLD COMPANY, INDIANA, AND THE NEW COMPANY, OHIO

The taxpayer in this case, one of the stockholders in Indiana, the dissolved company, exchanged his stock therein for stock of the new company, Ohio, for stock of Glidden, and for cash. There is no controversy as to the reorganization accomplished under the plan whereby Ohio acquired, first, all the stock of Indiana, and, second, all its properties and assets. This acquisition of stock and properties has been treated by both parties at all times as having effected a statutory reorganization within the meaning of Section 112 (i) (1) (A), Revenue Act of 1928, *infra*. Since it appears there was a reorganization between Indiana and Ohio, any gain represented by the stock of the new company is not recognizable under Section 112 (b) (3), Revenue Act of 1928, *infra*, because the new company

plainly was a "party" to the exchange constituting such reorganization.

The question here in issue is whether the gain to the taxpayer represented by the Glidden stock is to be unrecognized, as the petitioner contends, because that company must be regarded as a "party" to the reorganization within the meaning of the statutory definitions, or whether it is to be treated as taxable gain upon "other property" under Section 112 (c) (1), *infra*, as the respondent contends.

The question for determination in the instant case is identical with that presented in *Helvering* v. *Bashford*, No. 916, October Term, 1936, now No. 33 of the present term. In the *Bashford* case the Atlas Powder Company created a new corporation, which it controlled, for the specific purpose of acquiring the stock and the assets of three other corporations. The plan was carried out as proposed and in the exchanges between the three old corporations and the new subsidiary of Atlas a stockholder in one of the old corporations received cash, stock of the new company and stock of Atlas for his stock in the old company.

In both this and the *Bashford* case the Board of Tax Appeals held that the parent companies, Glidden and Atlas, were parties to the statutory reorganizations concededly effected between their newly created subsidiaries and other "old" corporations because of the parents' conception and execution of and intimate connection with the respective reorganization plans, and because there

would have been no reorganization in either case without the participation of the parent corporation.

In the instant case, the Circuit Court of Appeals for the Seventh Circuit, unlike that court for the Third Circuit, rejected the broad construction of the reorganization provisions adopted by the Board as an unwarranted extension of the definitions carefully included by Congress in the reorganization statute (R. 46). We believe the court below was correct in not feeling itself justified in extending the meaning of the term "party" as it appears in Section 112 (i) (2), *infra,* p. 16, to include Glidden under the facts of this case. The court pointed out that Congress has defined a party to a reorganization so as to permit a taxpayer to avoid what would otherwise be taxable income; that it could have refused to allow such deductions altogether; but that having exempted "gains" through reorganization, it could and did define reorganizations; and that in so doing it used the term "a party" to refer to "those who were in the reorganization" (R. 46). While relying upon the exemption from recognition of gain carefully expressed in the statute, the taxpayer declines to abide by the Congressional definition of the exemption terms.

The Congressional definition of a "party to a reorganization" here involved is found in Section 112 (i) of the Revenue Act of 1928, which defines a "reorganization". That section reads in part:

> (2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

The Government contends that the definition of a "party" plainly must be read in connection with the definition of a reorganization. In order to satisfy the statutory definition of "reorganization" a transfer of assets must be for a consideration which carries a definite, immediate and material interest in the assets transferred. *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378; *Bus & Trans. Corp.* v. *Helvering*, 296 U. S. 391; *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462. In a statutory reorganization Congress has temporarily postponed the tax upon the receipt of stock or securities in a party to a reorganization. Section 112 (b) (4), *infra*, p. 14. If the term "party to a reorganization" be limited to corporations which have a definite, substantial and immediate interest in the transferred assets, then the taxpayer who receives the stock of such a corporation in an exchange will have a consideration which satisfies the requirements of the above cited cases and will qualify for the temporary postponement of the tax (which is often called a statutory exemption) under Section 112 (b) (4). Thus the Congressional intent or statutory pattern is carried out.

But if the stock of a corporation which does not have a substantial, immediate and definite interest in the transferred assets be received without recognition of gain, there will result a departure from the statutory pattern and the receipt of stock which, would not of itself answer the requirements of the above cited cases will nevertheless result in the same temporary postponement of tax as would the receipt of stock in the corporation which is, for example, in actual possession of the transferred assets. In so far as the enumeration of parties to a reorganization in Section 112 (i) (2) includes corporations which do not have a definite, immediate and substantial interest in the transferred assets, there is an exception to the general rule, for they must be recognized as parties. But we submit that this is no warrant for recognizing additional exceptions, as the Board has done in this and the *Bashford* case.

The case narrows itself to this: Do the same tests for determining whether or not a reorganization has occurred apply to the determination of the question whether a corporation is a party to the reorganization? We submit that the identical tests are applicable, and that a corporation which is not specifically enumerated in Section 112 (i) (2) may not be regarded as a party to the reorganization unless it has a definite, immediate and substantial connection with the transferred assets. When the assets of A Corporation are transferred to B Corporation, it would seem to be clear that B

is the only corporation which has a definite, immediate and substantial connection with the transferred assets of A. When A's stockholders exchange their stock for stock of B they retain the same relationship to the assets behind their investment that they had in the beginning. But if A's stockholders exchange their stock for the stock of another corporation, which we may call C, they have *pro tanto* surrendered their interest in the assets of A. To the extent that they have surrendered their interest, they have departed from the statutory concept of the tax-free exchange and can no longer have the benefit of the statute. Substantially, that was the situation in the *Bus & Trans. Corp.* case, *supra*. Here, the stockholders of A, or Indiana, received stock of two companies; in addition to the stock of Glidden, which corresponds to C in the above illustration, they received stock of Ohio, which corresponds to B in the above illustration. Under the *Bus & Trans. Corp.* decision an exchange of Indiana stock for Glidden stock alone would not have resulted in the exemption. We submit that the result should be no different because Ohio stock was received in addition to the Glidden stock. In other words, we concede that the Ohio stock is entitled to the exemption because it preserves the requisite interest in the assets of Indiana. No attempt is made in this case to tax any profit represented by the receipt of the Ohio stock. But in so far as the Glidden stock is con-

cerned, we submit that its taxability is not affected by the fact that Ohio stock was received in addition.

We have argued fully in the brief for the petitioner in *Helvering* v. *Bashford,* No. 33, October Term, 1937, that (1) Atlas in that case was not a party to the reorganization within the literal terms of the statutory definition, and (2) Atlas was not a party to the statutory reorganization because it conceived and executed a general plan which included such a reorganization. As the facts of that case are strikingly similar to the facts of this case, and as Atlas there stands in a similar position to Glidden here, those arguments are equally applicable to the facts of this case, and accordingly both points I and II of the argument in the *Bashford* case are incorporated herein by reference and made a part hereof.

CONCLUSION

In view of the foregoing, we submit that the decision of the Circuit Court of Appeals should be affirmed.

Respctfully submitted.

STANLEY REED,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
MAURICE J. MAHONEY,
Special Assistants to the Attorney General.

OCTOBER 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(3) *Stock for Stock on Reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) *Same—Gain of Corporation.*—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

(c) *Gain from exchanges not solely in kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the

recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

(d) *Same—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) the term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) *Definition of control.*—As used in this section, the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 577. *Definitions.*—The term "reorganization" as used in sections 112, 113, and 115 means—

(1) A merger or consolidation (including the acquisition by one corporation of at

least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation),

(2) A transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred,

(3) A recapitalization, or

(4) A mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" as used in sections 112 and 113 includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise.

A person is, or two or more persons are, "in control" of a corporation, within the meaning of section 112, when owning—

(1) At least 80 per cent of the voting stock, and

(2) At least 80 per cent of the total number of shares of all other classes of stock of the corporation.

As used in section 112, as well as in other provisions of the Act, the conjunction "or" is used to denote both the conjunctive and the disjunctive, and the singular is used to include the plural. For example, the provisions of article 574 are complied with if

"stock and securities" are received in exchange as well as if "stock or securities" are received, and if securities in the same corporation, together with securities in another corporation a party to the reorganization or in other corporations parties to the reorganization, are received in exchange.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937

No. 21

HERMAN C. GROMAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing

EGBERT ROBERTSON,
JAMES C. SPENCE,
Counsel for Petitioner.

DAVID L. KREBS,
HENRY L. MCINTYRE,
Of Counsel.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petition for Rehearing

Now comes the above named Herman C. Groman, petitioner, and presents this his petition for rehearing of the above entitled cause and in support thereof respectfully shows:

1. Certain facts vital under the law of the opinion have been misapprehended.

2. It is a necessary inference from the opinion that *Helvering* v. *Watts*, 296 U. S. 387, has been overruled *sub silentio*.

1. The opinion of the Court has sustained our contention that whether the relation of the Glidden Company to the reorganization in this case was such as to constitute it a "party" thereto must be determined by "the ordinary connotation of the term [party]." But it appears that in our effort to establish the error of the Circuit Court of Appeals on this question of law we have failed to make the facts clear, because this Court has, we think, misapprehended certain vital facts, and as a result of this adopted a view of Glidden's participation in the transaction opposed to the uncontroverted record.

The opinion states (p. 5):

> "Glidden transferred nothing to them (the Indiana shareholders)."

This is incorrect. It is agreed that Glidden issued its own prior preference stock direct to the Indiana shareholders pursuant to the reorganization contract. (R. 12; Brief of Respondent, p. 4.) Glidden also guaranteed directly to the Indiana shareholders the payment of dividends on the *Ohio* stock, and the redemption of that stock within four years; so the Indiana shareholders received from Glidden in addition to the Glidden stock a commitment of Glidden to retire the Ohio stock. (R. 12.)

The opinion further states (p. 5):

> "The exchange was between Indiana's shareholders and Ohio. * * * Glidden contracted for the exchange and made it possible by subscribing and paying for Ohio's common stock in cash and prior preference stock so that Ohio could consummate the exchange. * * *"

This is incorrect; and this same error occurs in the opinion of the Circuit Court of Appeals. (R. 46.) There is no support in the record for the view that the common stock of Ohio was paid for in part by the prior preference stock of Glidden, or that Ohio ever owned any

Glidden stock. On the contrary, the fact that Glidden issued its prior preference stock direct to the Indiana shareholders indicates that this stock was not issued to Ohio. And the corollary fact that Glidden acquired the Ohio common stock for *cash* is affirmatively shown by the record. (R. 12, 21.)

In the light of these facts the comparison of Glidden's position in the transaction to that of a broker, promoter or agent is seen at once to be inappropriate. Its participation was not subordinate, but that of a principal. It was not a catalyst, or even a reagent, but its own chemical constitution was definitely altered in a reaction in which it was an indispensable constituent. It could not be Ohio's agent, because it was Ohio's creator. It could not be the agent of Indiana's stockholders, because it contracted with them at arm's length. It could not be a broker, because its contract was entirely for its own account; it had no principal to represent. A promoter is one who procures the investment of capital by others; Glidden's own capital was the basis of the reorganization, and there was no other new contribution. In so far as participation as a principal party in interest is the test of "partyship," the true facts make it clear that Glidden satisfied this requirement more fully than Ohio did; and participation as a principal is the basic idea in "the ordinary connotation of the term [party]."

2. The last page of the opinion says that to treat Glidden as a party here would violate the spirit of the Revenue Act because there is no sufficient continuity of interest *qua* the Glidden stock. We believe that the effect of this holding under the facts as they actually exist is to overrule the holding of this Court in *Helvering* v. *Watts*, 296 U. S. 387, although the *Watts* case is not discussed in this connection in the opinion.

In that case Watts exchanged his stock in Ferro-Alloys for bonds of that company and stock of Vanadium;

Vanadium acquired control of Ferro-Alloys, which continued to operate as a Vanadium subsidiary. This Court held that both Vanadium and Ferro-Alloys were parties to the reorganization; and both the Vanadium stock and the Ferro-Alloys bonds were received without recognition of gain. The continuity of Watts' interest in the assets of Ferro-Alloys, *qua* the Vanadium stock, was diluted by the acquisition of an interest in all Vanadium's other assets, just as in this case Groman's interest in the assets of Indiana, *qua* the Glidden stock, is diluted by his acquired interest in Glidden's other assets. And so in every case of a merger or consolidation there is of necessity such dilution by acquisition of an interest in assets other than those transferred. (See *Nelson Co.* v. *Helvering,* 296 U. S. 374; *Helvering* v. *Minnesota Tea Co,,* 296 U. S. 378; *Helvering* v. *Bashford,* No. 33, October Term, 1937, now set for reargument December 13, 1937.)

That this of itself does not destroy continuity of interest is made clear in the opinion of this Court, in *Minnesota Tea Co.* v. *Helvering,* 296 U. S. 378:

> "True it is that the relationship of the taxpayer to the assets conveyed was substantially changed, but this is not inhibited by the statute." (P. 386.)

The plain effect of the decision in the *Watts* case is to reassert this rule and hold that the retention by stockholders of an interest in the subsidiary's business, *via* stockholding in the parent corporation, is a sufficient continuity of interest in such business to satisfy the spirit of the Revenue Act.

And is this not the correct conclusion, both as to Watts and Groman? What Congress intended was to defer the ascertainment of gain or loss until the taxpayer's stake was removed from the table, enhanced or diminished. Here Groman's interest in Indiana's assets and business continues through the Glidden stock just as definitely

and substantially as through the Ohio stock; through the Glidden stock over $700,000.00 of the original stake of the Indiana stockholders remains on the table, subject to the same hazards.

If the Court in the *Watts* case had said (substituting the other names for those in the opinion here): "Was not Vanadium's stock 'other property' in the sense that its ownership represented a participation in assets in which Ferro-Alloys, and its shareholders through it, had no proprietorship," it seems to us the answer which would support the *Watts* opinion would be that whether Ferro-Alloys, or its stockholders through it, had a proprietorship in *Vanadium's* assets, is not relevant to the inquiry; the relevant question is whether the original Ferro-Alloys shareholders, through the *Vanadium* stock, retained a definite substantial proprietary interest in *Ferro-Alloys* original assets. So here we submit it is not material whether Ohio, or its shareholders *through it,* have any proprietorship in the assets of Glidden; the continuity of interest which the spirit of the law requires is the retained interest by Indiana's original stockholders, *through stock in Glidden,* in the former assets of Indiana, now held by Glidden's subsidiary.

We submit that under the true facts of this case the interest of the Indiana stockholders "continues to be definitely represented in substantial measure" *through the Glidden stock* equally as was Watts' interest through the Vanadium stock in the *Watts* case, and unless the *Watts* case is to be overruled, the opinion here should be changed. To do so neither disregards the letter nor violates the spirit of the Revenue Act as interpreted by prior decisions of this Court.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judg-

ment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, reversed.

Respectfully submitted,

EGBERT ROBERTSON,
JAMES C. SPENCE,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

We, Egbert Robertson and James C. Spence, counsel for the above named Herman C. Groman, petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

EGBERT ROBERTSON,
JAMES C. SPENCE,
Counsel for Petitioner.

P 5,

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1937.

Herman C. Groman, Petitioner,
vs.
Commissioner of Internal Revenue.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 8, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

This case involves the meaning and scope of the phrase "a party to a reorganization" as used in Section 112 of the Revenue Act of 1928.[1]

January 29, 1929, the petitioner, and all other shareholders of Metals Refining Company, an Indiana corporation, hereinafter designated Indiana, entered into a contract with the Glidden Company, an Ohio corporation, reciting that the shareholders of Indiana were desirous of merging and consolidating the properties of their company with Glidden and with a corporation Glidden was to organize under the laws of Ohio, which corporation we shall call Ohio. The shareholders covenanted that they would assign their shares to Ohio, which was to have a specified capital structure divided into preferred and common shares, and Glidden covenanted that it would issue and deliver, or cause to be issued and delivered to the shareholders a stated number of shares of its own prior preference stock at an agreed valuation, a stated number of shares of the preferred stock of Ohio, also at an agreed valuation, and sufficient cash to equal the appraised value of Indiana's assets as of March 1, 1929, and that, after the exchange of stock, Glidden would cause Indiana to transfer its assets to Ohio.

Glidden organized Ohio and became the owner of all its common stock but none of its preferred stock. Pursuant to the contract the shareholders of Indiana transferred their stock to Ohio and received therefor a total consideration of $1,207,016 consisting of Glidden prior preference stock valued at $533,980, shares of the

[1] Ch. 852, 45 Stat. 791, 816.

preferred stock of Ohio valued at $500,000, and $153,036 in cash. Indiana then transferred its assets to Ohio and was dissolved.

As a result of the reorganization petitioner received shares of Glidden stock, shares of Ohio stock, and $17,293 in cash. In his return for 1929 he included the $17,293 as income received but ignored the shares of Glidden and of Ohio as stock received in exchange in a reorganization. The respondent ruled that Glidden was not a party to a reorganization within the meaning of the Revenue Act, treated the transaction as a taxable exchange to the extent of the cash and shares of Glidden, and determined a deficiency of $7,420. Upon receipt of notice to this effect the petitioner appealed to the Board of Tax Appeals which reversed the Commissioner, holding that Glidden was a party to a reorganization. The Circuit Court of Appeals reversed the Board.[2] We granted the writ of certiorari because of an alleged conflict of decision.[3]

Section 112 (b) (3) of the Revenue Act of 1928 declares that "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization." If the transaction involves the receipt of such stock or securities and "also of other property or money" then the gain, if any, is to be recognized in an amount not in excess of the sum of such money and the fair market value of such other property. [Section 112 (c) (1).]

Section 112 (i) (1) declares: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected." Subsection (2) is: "The term

[2] 86 F. (2d) 670.

[3] See *Sage* v. *Commissioner*, 83 F. (2d) 221; *Commissioner* v. *Fifth Avenue Bank*, 84 F. (2d) 787; *Commissioner* v. *Bashford*, 87 F. (2d) 827.

'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation."

It is agreed that under the plain terms of the statute the cash received by the petitioner was income, and that as the stock of Ohio was obtained in part payment for that of Indiana, the exchange, to that extent, did not give rise to income to be included in the computation of petitioner's tax.

The question is whether that portion of the consideration consisting of prior preference shares of Glidden should be recognized in determining petitioner's taxable gain. The decision of this question depends upon whether Glidden's stock was that of a party to the reorganization for, if so, the statute declares gain or loss due to its receipt shall not be included in the taxpayer's computation of income for the year in which the exchange was made.

If Section 112 (i) (2) is a definition of a party to a reorganization and excludes corporations not therein described, Glidden was not a party since its relation to the transaction is not within the terms of the definition. It was not a corporation resulting from the reorganization; and it did not acquire a majority of the shares of voting stock and a majority of the shares of all other classes of stock of any other corporation in the reorganization. The Circuit Court of Appeals thought the section was intended as a definition of the term party as used in the Act and excluded all corporations not specifically described. It therefore held Glidden could not be considered a party to the reorganization.

The petitioner contends, we think correctly, that the section is not a definition but rather is intended to enlarge the connotation of the term "a party to a reorganization" to embrace corporations whose relation to the transaction would not in common usage be so denominated or as to whose status doubt might otherwise arise. This conclusion is fortified by the fact that when an exclusive definition is intended the word "means" is employed, as in the section we have quoted defining reorganization and in Section 112 (j), defining the term "control", whereas here the word used is "includes." If more were needed Section 701 (b) declares: "The terms 'includes' and 'including' when used in a definition contained in this Act shall not be deemed to exclude other things otherwise within the meaning of the term defined."

The Treasury, in its regulations, has construed the section as not embodying an exclusive definition.[4] The administrative construction of an identical section in the Revenue Acts of 1924 and 1926 has been the same.[5]

If the shareholders of A, and those of B, should agree to convey their stock to a new corporation C, in exchange for C's stock, a reorganization, as defined in Section 112 (i) (1) would be effected. But it might well be contended, were it not for Section 112 (i) (2), that the shareholders of the old corporations had not received stock in a non-taxable exchange, as specified in Section 112 (b) (3), since the new corporation C was not a party to the exchange. In the present instance, Indiana had no part in the transaction. The shareholders agreed to transfer their stock to Ohio in exchange for securities. Indiana, as such, was not a party to any agreement and took no corporate action. If the plan had contemplated the continued existence of Indiana, and part payment of its shareholders in bonds or preferred stock of that company, and part in shares of Ohio, while this would clearly have constituted a reorganization as defined by the Act, it might, with reason, be urged that, as respects the bonds or preferred stock of Indiana, the exchange was taxable since Indiana was not a party to the reorganization. Section 112 (i) (2) precludes the contention.[6]

Plainly, however, there may be corporate parties to reorganizations, within the meaning of the statute, other than those enumerated in Section 112 (i) (2). Thus if corporations A and B transfer all their assets to C, a new corporation, in exchange for all C's stock, the stock received is not a basis for calculation of gain on the exchange.[7] A and B are so evidently parties to the reorganization that we do not need Section 112 (i) (2) to inform us of the fact.

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[4] Treasury Regulations 74, promulgated under the Revenue Act of 1928, Art. 577: "The term 'a party to a reorganization' . . . includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation. This definition is not an all-inclusive one, but simply enumerates certain cases with respect to which doubt might arise."

[5] Regulations 65, Art. 1577, applicable to Section 203 (h) (2) of the Revenue Act of 1924; Regulations 69, Art. 1577, applicable to Section 203 (h) (2) of the Revenue Act of 1926.

[6] Compare *Helvering* v. *Watts*, 296 U. S. 387.

[7] Compare *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378; *G. & K. Manufacturing Co.* v. *Helvering*, 296 U. S. 389.

Again, if company A transfers all its assets to company B, a going concern, upon the agreement of B to issue to A's shareholders its stock in such amount that they will own eighty per cent of every class of B's outstanding stock; the consummation of the agreement will be a reorganization under the Act.[3] Unquestionably the gain ensuing upon the exchange of stock by A's shareholders will not be taxable since the stock received by them is that of B, a party to the reorganization, though B is not described as such in Section 112 (i) (2). We must, therefore, irrespective of Glidden's failure to qualify as a party under that section, determine whether its relation to the reorganization is that of a party within the ordinary connotation of the term.

Glidden was a party to an agreement with the shareholders of Indiana and the agreement envisaged a reorganization as defined by Section 112 (i) (1) (A) for it contemplated that Ohio should acquire all of the stock of Indiana. The agreement was fulfilled. But the crucial question is whether Glidden was a party to the reorganization thus effected. Glidden received nothing from the shareholders of Indiana. ~~Glidden transferred nothing to them.~~ The exchange was between Indiana's shareholders and Ohio. Do the facts that Glidden contracted for the exchange and made it possible by subscribing and paying for Ohio's common stock in cash ~~and prior preference stock~~, so that Ohio could consummate the exchange, render Glidden a party to the reorganization? No more so than if a banking corporation had made the agreement with Indiana's shareholders and had organized the new corporation, and, by subscription to its stock and payment therefor in money and the banking company's stock put the new company in position to complete the exchange. Not every corporate broker, promoter, or agent which enters into a written agreement effectuating a reorganization, as defined in the Revenue Act, thereby becomes a party to the reorganization. And, if it is not a party, its stock received in exchange, pursuant to the plan, is "other property" mentioned in Section 112 (c) (1) and must be reckoned in computing gain or loss to the recipient. Glidden was, in the transaction in question, no more than the efficient agent in bringing about a reorganization. It was not, in the natural meaning of the term, a party to the reorganization.

[3] Section 112, Subsections (i) (1) (B) and (j).

It is argued, however, that Ohio was the *alter ego* of Glidden; that in truth Glidden was the principal and Ohio its agent; that we should look at the realities of the situation, disregard the corporate entity of Ohio, and treat it as Glidden. But to do so would be to ignore the purpose of the reorganization sections of the statute, which, as we have said, is that where, pursuant to a plan, the interest of the stockholders of a corporation continues to be definitely represented in substantial measure in a new or different one, then to the extent, but only to the extent, of that continuity of interest, the exchange is to be treated as one not giving rise to present gain or loss.[9] If cash or "other property",—that is, property other than stock or securities of the reorganized corporations,—is received, present gain or loss must be recognized. Was not Glidden's prior preference stock "other property" in the sense that its ownership represented a participation in assets in which Ohio, and its shareholders through it, had no proprietorship? Was it not "other property" in the sense that *qua* that stock the shareholders of Indiana assumed a relation toward the conveyed assets not measured by a continued substantial interest in those assets in the ownership of Ohio, but an interest in the assets of Glidden a part of which was the common stock of Ohio? These questions we think must be answered in the affirmative. To reject the plain meaning of the term "party", and to attribute that relation to Glidden, would be not only to disregard the letter but also to violate the spirit of the Revenue Act.

We hold that Glidden was not a party to the reorganization and the receipt of its stock by Indiana's shareholders in exchange, in part, for their stock was the basis for computation of taxable gain to them in the year 1929.

The judgment is

Affirmed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

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[9] *Pinellas Ice Co.* v. *Commissioner*, 287 U. S. 462, 470; *Nelson Co.* v. *Helvering*, 296 U. S. 374, 377; *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 385; *G. & K. Manufacturing Co.* v. *Helvering*, 296 U. S. 389, 391.